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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

KENNETH TIERNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

MATHIAS REILLY, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kenneth Tierney, Mathias Reilly, Daniel Crawford, Thomas Laffey and Paschal Morahan respectfully pray that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the Fifth Circuit entered on August 3, 1972.

Opinion Below

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1a-16a) has not been reported. The district court entered judgment without opinion.[1] The order (App. C, *infra*, pp. 26a-27a) and opinion (App. D, *infra*, pp. 28a-30a) of Mr. Justice Douglas ordering petitioners admitted to bail has also not yet been reported.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 3, 1972, and this petition has been filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where the government has wiretapped the conversation of an attorney representing a federal grand jury witness while the attorney is engaged in that representation, whether, consistent with the Fifth and Sixth Amendments, the relevance of the conversation to the grand jury and related court proceedings involving the witness, necessary to ascertain in order to determine whether there has been a violation of the right to counsel, may be determined without disclosure of the conversation and an adversary hearing?

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[1] The court did of course enter findings of fact and conclusions of law. The findings and conclusions pertinent to this petition are included in Appendix B, *infra*, pp. 17a-25a.

2. Whether, consistent with the Fifth Amendment privilege against self-incrimination, a witness before a federal grand jury can be compelled under 18 U.S.C. § 6002 to incriminate himself under the law of a foreign jurisdiction, where there exists a substantial fear of foreign prosecution and where neither the Fifth Amendment nor § 6002 affords immunity from use of his grand jury testimony against him in criminal proceedings in that jurisdiction?

3. Whether the failure of the government to comply with Department of Justice regulations regarding an application to compel testimony before a grand jury invalidates the resulting order to testify and the judgment of contempt for noncompliance therewith?

Provisions Involved

The constitutional, statutory, rule and regulatory provisions involved are the Fifth and Sixth Amendments to the Constitution, 28 U.S.C. § 1826 and 18 U.S.C. §§ 6002-3, Rule 6(e) of the Federal Rules of Criminal Procedure, and the Department of Justice guidelines regarding government applications for orders to compel grand jury testimony. The statutes, Rule 6(e) and the guidelines are included in Appendix E, *infra*, pp. 31a-41a.

Statement of the Case

Petitioners and other Irish-Americans living in New York were subpoenaed to appear beginning June 19 before a federal grand jury sitting in the Northern District of Texas, Fort Worth Division.[2] On that date, petitioner

[2] The investigation before the grand jury was of possible violations of Title I of the Gun Control Act of 1968 (18 U.S.C. § 921 *et seq.*); Title II of the Gun Control Act of 1968 (26 U.S.C. § 5861; Title XI of the Organized Crime Control Act of 1970 (18 U.S.C. § 841 *et seq.*); Foreign Agents Registration Act (22 U.S.C. § 611 *et seq.*); and conspiracy (18 U.S.C. § 371).

Tierney appeared before the grand jury but declined to answer a number of questions on constitutional and statutory grounds.[3] Counsel were thereupon served by the government with an application for an order to compel Tierney to testify pursuant to 18 U.S.C. §§ 6002-3.[4] A hearing was held forthwith before the district court (Brewster, J.), after which the application was signed by the court. Petitioner was returned immediately to the grand jury but, upon advice of counsel, declined to answer any further questions on the grounds previously asserted. Again on the following morning, June 20, petitioner was required to and did appear before the grand jury, again declining to answer the questions asked him by the government attorneys.

On the government's application (and over petitioner's objection) a contempt hearing was held that same day.[5] Arguments that there was the possibility of unlawful electronic surveillance of the witness and his counsel, that answering questions would tend to incriminate petitioner under the laws of Great Britain, and that the government had admittedly failed to follow its own guidelines in seeking a judicial order to compel petitioner to testify[6] were held not to constitute "just cause" for petitioner's declining to testify. Tierney was adjudged in civil contempt and remanded to the Tarrant County Jail in Forth Worth until he purged himself of contempt or the grand jury

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[3] Specific questions asked by the government are discussed *infra*, at pp. 17-19.

[4] See Appendix E, *infra*, pp. 32a-33a.

[5] See 28 U.S.C. § 1826(a), Appendix E, *infra*, p. 31a.

[6] See Appendix E, *infra*, pp. 34a-41a.

expired.[7] A stay or bail pending appeal was denied by the district court.[8]

A similar course of events occurred as to petitioners Reilly, Crawford, Laffey and Morahan.[9] Represented by the same counsel as was Tierney, each appeared before the grand jury, declined on constitutional and statutory grounds to answer several questions and continued to refuse to answer those questions after being ordered to do so by the district court under §§ 6002-3. In a single proceeding held on June 27, all were adjudged in civil contempt and remanded immediately to Tarrant County Jail.

In its brief to the Fifth Circuit on the consolidated appeals, the government admitted for the first time that an attorney for petitioners had in fact been overheard by electronic surveillance.[10] *This surveillance occurred on*

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[7] The grand jury was empanelled in May, 1972, and will sit for eighteen months, or until November, 1973.

[8] A stay or bail was also denied by the Court of Appeals for the Fifth Circuit and by Mr. Justice Powell. However, as will appear more fully *infra*, Mr. Justice Douglas, by order and opinion dated September 12, ordered petitioners admitted to bail pending the filing and disposition of this petition for certiorari and, if certiorari is granted, until decision by this Court on the merits.

[9] As the Court of Appeals noted in reference to petitioners: "The pattern of his conduct before the grand jury and the general proceedings thereafter with respect to each appellant are similar to the extent that we may consider all as being in the same factual posture for the purpose of considering the issues presented by the appeals." App. A, *infra* at p. 5a.

[10] The overhear of counsel occurred in the course of wiretapping purportedly authorized by court order under 18 U.S.C. § 2518. Counsel made a call to a telephone which was under electronic surveillance.

June 17, 1972, after petitioners were subpoenaed, after counsel had undertaken to represent them,[11] *and two days before they were to appear before the grand jury. Subsequently, the government admitted that this surveillance was conducted "in connection with a separate aspect of the investigation."*[12]

Citing this Court's decisions in *Hoffa* v. *United States*, 387 U. S. 231, 233 (1967), *Kolod* v. *United States*, 390 U. S. 126 (1968), and *Alderman* v. *United States*, 394 U. S. 165, 167 (1969), and the Fifth Circuit's own decisions in *Stassi* v. *United States*, 410 F. 2d 946, 953 (5 Cir., 1969) and *Clay* v. *United States*, 430 F. 2d 165, 166 (5 Cir., 1970), rev'd. on other grounds 403 U. S. 698 (1971), petitioners, in their reply brief, asserted that, in view of the admission of surveillance of counsel, the required and appropriate procedure was to remand the cases to the district court for a hearing and determination of the issues arising out of the surveillance. It was specifically asserted that petitioners would seek disclosure of the contents of the log in order to ascertain violation of the right to counsel guaranteed by the Sixth Amendment. Nevertheless, the Court of Appeals affirmed the judgments against petitioners without remanding the cases to the district court and without ordering disclosure of the contents of

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[11] On or about June 15, the attorneys who are counsel on this petition agreed to represent petitioners (and others) in the course of their respective appearances before the grand jury. From that point on, they had extensive discussion by telephone and otherwise with the clients, with each other, and with third persons relating to the representation of petitioners.

[12] Memorandum For the United States In Opposition to Renewed Application For Stay of Execution Of Judgment or Bail Pending Appeal, p. 2.

the log so as to afford petitioners an opportunity to show violation of their Sixth Amendment rights. The Court simply stated: "We have made an in camera examination of the transcript of this overhear. It contains nothing of evidentiary substance nor does it in anywise have to do with the right to counsel or the adequacy of representation by counsel." (App. A, *infra* at p. 13a)

On the question of the scope of the privilege against self-incrimination, the appellate court doubted neither that responsive answers might tend to incriminate petitioners under foreign law, nor that there was a substantial risk of foreign prosecution. However, the Court felt that the secrecy of grand jury proceedings precluded a substantial risk of use of their testimony against them in a foreign jurisdiction. Finally, the court refused to enforce the Justice Department guidelines regarding applications to compel witnesses to testify. Petitioners could not object to government non-compliance with its own guidelines since, in the court's view, "[t]hey are not directed to the procedural or substantive rights of prospective witnesses." (App. A, *infra*, at p. 14a).

By order dated September 12, Mr. Justice Douglas ordered petitioners admitted to bail pending the timely filing and disposition of this petition and, if certiorari is granted, until determination of the merits.[13] In his opinion accompanying the order, Mr. Justice Douglas wrote as follows:

> It is now argued that petitioners have obtained all the immunity to which they were constitutionally

[13] The Fifth Circuit on August 8 and Mr. Justice Powell on August 22 had denied such relief sought by renewed application for stay or bail submitted after the government's admission of surveillance. Petitioners finally obtained their release on September 23.

entitled and that there is no longer an attorney-client privilege to be protected. Hence it is argued that the Sixth Amendment right to counsel which weighed heavily with me in *Russo and Ellsberg* v. *Byrne,* (in which I granted a stay on July 29, 1972) is not relevant here.

I accept of course the Court decision that only "use" immunity, not "transactional" immunity, is the constitutional standard under the Fifth Amendment. The fact remains, however, that the "leads" obtained from testimony given after the "use" immunity has been granted can be used to indict and convict the petitioners. It seems to me therefore that the attorney-client privilege does continue and indeed may be much more vital to the petitioners than it would have been had the "transactional" immunity been the one adopted by the Court.

The question remains whether a search warrant issued for electronic surveillance under the Fourth Amendment can invade the domain of the Sixth Amendment and destroy the attorney-client relation. That is an exceedingly serious question on which this Court has not spoken.

Beyond those two questions there is a further one—whether on the issue of relevance an *in camera* proceeding is adequate or whether an adversary hearing is required. That is the question central to both *Russo and Ellsberg* . . . and to the present two cases.

Hence in spite of the fact that my Brother Powell has heretofore denied bail in these cases, I have reluctantly concluded that the requisite for bail in civil contempt cases, 28 U.S.C. § 1826(b), has been satisfied here. *Tierney* v. *United States* and *Reilly et al.* v. *United States,* Nos. A-49 and A-80 (App. D, *infra* pp. 29a-30a).

REASONS FOR GRANTING THE WRIT

The Petition presents important and fundamental questions not heretofore resolved by this Court but decided by the Court of Appeals in a way seemingly out of harmony with the import of previous decisions of this Court.

1. The procedure required to determine whether or not government wiretapping of counsel has violated the Sixth Amendment rights of his client is a question of substantial importance; the *in camera* inspection approved below is inconsistent with the decision of this Court in *Alderman* v. *United States*, 394 U.S. 165 (1969) requiring disclosure and an adversary hearing to determine relevance and should not be allowed to stand.

Wiretapping resulting in the overhear of an attorney threatens fundamental constitutional considerations. Concomitant to the right of the client to consult with counsel with the full assurance that their communications will be confidential is the right to have his attorney undertake representation of his interests free from the uninvited ear of government. *Hickman* v. *Taylor*, 329 U. S. 495, 510-511 (1947). The course of this representation may well (in fact, usually will) include discussions with third parties as to the facts relevant to the client's case or as to legal strategy or legal positions to be undertaken in the course of that representation. E.g., *Hickman* v. *Taylor*, *supra*; *In re Turkeltoub*, 256 F. Supp. 683 (S. D. N. Y., 1966). To permit the government to act upon the basis of what it surreptiously overhears from an attorney engaged in such discussions, to permit it to learn in advance what that legal representation will be and to act upon that foreknowledge, *Taglianetti* v. *United States*, 398 F. 2d 558, 570 (1 Cir. 1968), aff'd 394 U. S. 316 (1969),

would be to strike irrevocably at our adversary system of justice and the constitutional right to effective assistance of counsel. It is no surprise therefore that electronic surveillance resulting in the overhear of an attorney has met with stern disapproval from this Court. *Black* v. *United States,* 385 U. S. 26 (1966); *O'Brien* v. *United States,* 386 U. S. 345 (1967). See also *Coplon* v. *United States,* 191 F. 2d 749 (D. C. Cir., 1951) cert. den. 342 U. S. 926 (1952).

A person subpoenaed before a grand jury will have strong need of counsel, for as one court has observed, "testimony before the grand jury is not merely the exchange of pleasantries."[14] Numerous and complex rights and liabilities are often involved, yet the average citizen may have even less knowledge of these than of his rights and liabilities as a defendant in a criminal proceeding. The right to decline to answer questions that might tend to incriminate oneself is a right of a witness,[15] yet even where immunity is conferred upon the witness, he will still have the need of counsel to insure full enforcement of that protection.[16] Moreover, giving testimony may vio-

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[14] *Sheridan* v. *Garrison,* 273 F. Supp. 673, 678 (E. D. La., 1967), rev'd on other grounds 415 F. 2d 699 (5 Cir., 1969), cert. den. 396 U. S. 1040 (1970).

[15] *Hoffman* v. *United States,* 341 U. S. 479 (1951).

[16] As Mr. Justice Douglas noted in respect to a case where the immunity is "use" immunity, there is the danger that as a matter of fact " 'leads' obtained from testimony given after the 'use' immunity has been granted [will] be used to indict and convict" the witness. Counsel is needed to protect the witness against this eventuality.

late the constitutional,[17] statutory[18] or common law[19] rights of a witness, notwithstanding an adequate grant of immunity. Further, counsel may help a witness steer clear of a prejury charge where questions may be ambiguous or their significance not readily apparent. Counsel is thus needed to advise the client and to protect his rights. It follows that the witness has the right and need to have that counsel conduct his representation free from the uninvited ear of government.

As important as a client's right to representation by counsel free from government wiretapping is the procedure of insuring full protection of that right, for without such protection the right itself is diluted. The basic issue presented here is whether the relevance of an attorney's wiretapped conversation to his representation of petitioners, which must necessarily be determined in order to ascertain whether or not their Sixth Amendment rights have been violated, may be determined without disclosure and an adversary hearing.[20] It is a question of substantial importance to all those made participants in judicial

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[17] *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920) (Fourth Amendment); *Bursey and Presley* v. *United States*, No. 26,479 (9 Cir., 1972) (First Amendment); *Bursey and Presley* v. *United States*, *op. cit.* (Fifth Amendment due process).

[18] *Gelbard* v. *United States*, —— U. S. —— (1972) (18 U.S.C. § 2515).

[19] *Blau* v. *United States*, 340 U. S. 332 (1951) (confidential marital communication); *United States* v. *Kovel*, 296 F. 2d 918 (2 Cir., 1961) (attorney-client privilege).

[20] This is the same question as is presented in *Russo and Ellsberg* v. *Byrne*, No. 72-307 (cert. pending).

proceedings. It is a question which goes to the heart of what has heretofore been an adversary system of law. Only three years ago, in *Alderman* v. *United States,* 394 U. S. 165 (1969), this Court held that where it was necessary to determine the relevance of wiretapped conversations, the determination *could not* be made *in camera* by the court but could only be made in an adversary proceeding after disclosure to both parties of the contents of the wiretapped conversations. The rationale which lies at the heart of the *Alderman* decision was set forth as follows:

> An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts .... And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all the relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin of error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case. 394 U. S. at 182.

Only last term, despite urging by the government, this Court refused to overrule *Alderman. United States* v. *United States District Court,* 407 U. S. 297, 324, n. 21 (1972).

The decision below, approving *in camera* inspection to determine the relevance of counsel's wiretapped conversation, is in direct conflict with *Alderman,* the apparent result of a confusion between Fourth and Sixth Amend-

ment violations. The lawfulness of electronic surveillance under the Fourth Amendment (or 18 U.S.C. §§ 2510-20) is determinable without regard to the contents of the overheard conversation. One need not examine those contents to ascertain whether the surveillance was conducted in conformity with a lawfully issued warrant. On the other hand, whether or not electronic surveillance violates the Sixth Amendment right to counsel cannot be determined without an examination of the overheard conversation. It is the contents of the conversation and their relationship to the attorney's representation of petitioners that are decisive. Overhearing an attorney's conversation involving the representation of petitioners violates their Sixth Amendment right of counsel. Contrarily, if the conversation is unrelated to that representation then no violation of petitioners' Sixth Amendment rights has occurred. Thus in order to ascertain whether or not there has been a Sixth Amendment violation and whether it is petitioners' Sixth Amendment rights that have been violated, *it is necessary to determine the relevance of the wiretapped conversation to their representation.*[21] *Alderman* therefore controls and disclosure was required. The danger that the Court sought to avoid in *Alderman,* that the significance of "an apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words," *op. cit.,* might well go unnoticed by a judge, admittedly "less well acquainted with all the relevant circumstances," *op. cit.,* is particularly acute here where the

[21] *Giordano* v. *United States,* 394 U. S. 310 (1969), indicating that the lawfulness of surveillance under the Fourth Amendment might be determined without disclosure and an adversary hearing, is therefore inapposite.

conversation took place at the height of the period in which counsel were preparing the representation of petitioners and where the surveillance occurred "in connection with a separate aspect of the investigation." *Op. cit.* The decision below constitutes a severe undermining of the rule of *Alderman*[22] and should not be allowed to stand.[23]

A further question is also presented here: whether a court order vitiates the Sixth Amendment right of the client to representation by counsel free of the uninvited ear of government or, as stated by Mr. Justice Douglas, "whether a search warrant issued for electronic surveillance under the Fourth Amendment can invade the domain of the Sixth Amendment and destroy the attorney-client relation." *Op. cit.* The Court of Appeals apparently resolved this question in favor of petitioners for, notwithstanding the court order in this case, it did examine the log *in camera*, presumably with the intention of ordering

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[22] It is also inconsistent with *Schwimmer* v. *United States*, 232 F. 2d 855 (8 Cir.), cert. den. 352 U. S. 833 (1956). In that case a grand jury subpoena *duces tecum* for an attorney's files and papers was served upon the bailee of the files. The Court of Appeals held that in order to protect the attorney-client privilege, the attorney (who had intervened) had a right to have turned over to him the allegedly *un*privileged files so that *he* might determine which were privileged and which were not and then seek judicial protection accordingly. The Court specifically concluded that a master appointed by the lower court could not make that determination alone. 232 F. 2d at 864-65.

[23] We note that considerations of so-called "national security" which would have led two justices to limit disclosure in *Alderman*, 394 U. S. at 197-200 (Justice Harlan, concurring and dissenting); *id.* at 209-11 (Justice Fortas, concurring and dissenting), are not involved here in any way.

disclosure if it found the conversation relevant. In any event, in the words of Mr. Justice Douglas, this "is an exceedingly serious question on which this Court has not spoken." *Op. cit.*

2. Whether the Fifth Amendment protects against self-incrimination under foreign law where there exists a reasonable fear of foreign prosecution is a fundamental question this Court has already determined worthy of plenary review.

In *Zicarelli* v. *New Jersey State Commission of Investigation,* 406 U. S. 472 (1972), jurisdiction was noted specifically to consider, *inter alia,* the question presented here, i.e., whether the Fifth Amendment protects a witness in a jurisdiction in the United States from incrimination under the law of a foreign jurisdiction. (See Question 4 in limited notation of jurisdiction at 401 U. S. 933 (1971); see also 406 U. S. at 478). In deciding *Zicarelli,* however, the Court refrained from resolving this question because there did not appear to be a real danger of incrimination under foreign law. 406 U. S. at 478-481. However, the following was carefully noted:

> Should the Commission inquire into matters which might incriminate him under foreign law and pose a substantial risk of foreign prosecution . . . then a constitutional question will be squarely presented. *Id.* at 481.

The "constitutional question" that the Court was unable to reach in *Zicarelli* is "squarely presented" here. The instant case arises from an investigation into alleged smuggling of firearms from the United States to the Irish Re-

publican Army in Northern Ireland.[24] It is evident "from the implications" of the questions asked petitioners, "in

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[24] This has been reported by several newspapers. Cf. *Hoffman v. United States, supra.* On June 23, 1972, shortly after petitioners were subpoenaed, the *Dallas Morning News* reported:

> "A request by the British government led to the federal grand jury investigation here of efforts of Irish Republican Army sympathizers to obtain weapons and explosives in Dallas and other U. S. cities The News learned Thursday. Informed sources said British soldiers seized a cache of weapons used by the Irish terrorists and determined that the weapons had came from the U. S. and Japan. Then, The News was told, high-ranking British officials asked the Nixon Administration to take steps to cut off the flow of arms to IRA groups involved in fighting and bombing in Northern Ireland."

The *New York Times,* July 17, 1972, in an article entitled "Gun-Running case in U. S. Embitters I.R.A. Supporters," stated:

> "Although officials in the Justice, Treasury and State Departments are reluctant to talk about the investigation in any detail, several have indicated that it began in Northern Ireland recently with the appearance of a semi-automatic rifle called the AR-180 in the hands of I.R.A. terrorists. The AR-180 is manufactured in Japan for the Armalite Corporation of Costa Mesa, California. The entire Japanese production is reportedly shipped to the United States, where the light-weight, aluminum-frame weapon has had a ready market among sportsmen and, to an extent, police departments. . . . Since the bitter, triangular hostilities erupted in 1969—involving I.R.A. gunmen, the British Army and Protestant extremists—11 AR-180s have been seized from the I.R.A. by British troops and the Royal Ulster Constabulary. Several of the seized Armalites were traced back to purchases made from local gun dealers in the United States, acording to the constabulary headquarters. . . . The British government is reported to have made representations to

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the setting in which [they were] asked," *Hoffman* v. *United States*, 341 U. S. 479, 486-87 (1951),[25] that responsive an-

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several countries, including the United States, to stop the flow of arms to the I.R.A. . . . Mathias Reilly, a 31-year-old bus driver from Blauvelt, N. Y., was asked if he had ever purchased 'Armalite rifles' and Mr. Tierney was asked if he had ever bought 'firearms' from Edward Agramonte, a gun dealer in his hometown of Yonkers. . . . Asked about AR-180s, Mr. Agramonte said: "We've sold a few; in the past two, three years maybe a dozen, two dozen."

[25] The following are typical examples of the questions asked petitioners:

Mr. Tierney, have you ever purchased firearms from a weapons' dealer in Westchester County, New York, named Edward Agramonte?

Mr. Tierney, have you ever given your driver's license to any other individual to be used as identification in the purchase of firearms?

Mr. Tierney, do you have any knowledge of any person or person (sic) who, in New York, Texas, and elsewhere, are engaged in the purchase of illegal weapons and explosives or in the purchase of legal weapons illegally?

Mr. Tierney, are you acquainted with a Patrick Purcell? Have you ever been to a firearms dealer whose name is John Jalowsky?

• • •

Mr. Reilly, have you ever purchased a number of armalite rifles, and to aid you in this matter, these are commonly referred to as AR-180 from a licensed firearms dealer?

Mr. Reilly, have you ever knowingly allowed your name to be used in connection with the purchase of any firearms?

Mr. Reilly, has James O'Gara ever given you money for the purchase of Armalite rifles?

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Mr. Reilly, do you have any knowledge of any person or persons who have purchased or acquired illegal firearms or explosives or have legally (sic) purchased otherwise legal firearms in New York or Texas or other areas?

• • •

Mr. Crawford, are you presently licensed to drive a car in the State of New York?

Do you have any knowledge of persons engaging in the purchase of illegal weapons or explosives or . . . the illegal purchase of legal weapons in New York or Texas or other place?

Mr. Crawford, are you acquainted with a Charles or Liam Murphy?

• • •

Mr. Morahan, have you ever aided any person or persons in the illegal purchase of firearms?

Mr. Morahan, do you know James O'Gara?

Mr. Morahan, have you ever given your driver's license to another individual for the purpose of purchasing firearms illegally?

Mr. Morahan, do you have knowledge of any person or persons who have engaged in the illegal purchase of otherwise legal firearms in the State of New York and Texas or may have acquired or purchased illegal firearms or explosives in those two states or other places?

• • •

Mr. Laffey, have you ever purchased any firearms or explosives?

Mr. Laffey, have you ever purchased Armalite rifles designated AR-180's from a gun dealer in New York operating under the name of Edleman's?

Mr. Laffey, have you ever received any money from any person for the purpose of purchasing weapons or explosives?

(Footnote continued on following page)

swers might tend to incriminate them under the laws of Great Britain and Northern Ireland relating to murder, smuggling, firearms violations and conspiracy. See also *Malloy* v. *Hogan*, 378 U. S. 1, 11-14 (1964). The Court of Appeals did not doubt this (nor has respondent seriously questioned it).

It is also clear that there is a substantial risk of foreign prosecution. Great Britain is well aware of the alleged smuggling of firearms into Northern Ireland and is conducting an extensive effort to bring that alleged smuggling to a halt.[26] Moreover, traveling in Great Britain or extra-

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Mr. Laffey, have you ever used the driver's license of any other individual for the purpose of identification in purchasing firearms?

Mr. Laffey, have you any knowledge of any person or persons in the States of New York or Texas or elsewhere who are engaged in the purchase of legal weapons illegally or the illegal purchase of weapons or explosives?

[26] *The Herald Statesman*, a Yonkers, New York paper, in a July 12 article entitled "British seeking ways to implement curb on gun-running Irish rebels" by Arthur L. Garshon, Associated Press (London), states:

"British investigators have established that arms and funds are reaching the Irish Republican Army mainly from U. S. and European sources, including Britain itself. . . . Britain has repeatedly asked the United States—and Japan—to track down and halt leakages of a high velocity rifle to the IRA for use in Northern Ireland. . . . Since the 1969 insurrection began British diplomatic missions abroad have been on the alert for evidence of IRA fund raising and arms buying. . . . More worrying to Britain, according to senior

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dition pursuant to the Dawes-Simon Extradition Treaty of 1932, 47 Stat. 2122, will allow Great Britain to gain custody over petitioners in order to bring them to trial.

In *Murphy* v. *Waterfront Commissioner,* 378 U. S. 52 (1964), this Court held that the constitutional privilege protects a witness not only against incrimination in the questioning jurisdiction but in other jurisdictions as well. *Murphy* involved the protection to be afforded a witness in another United States jurisdiction, but it is equally applicable to the protection of a witness in a foreign jurisdiction. Significantly, the *Murphy* court relied upon and quoted approvingly and at length from the decision in *United States* v. *McRae,* L.R. 3 Ch. App. 79 (1867), in which the English Court of Chancery held that where there exists a real danger of prosecution *in a foreign country,*

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> officials, is an inflow of U. S. weapons to Ulster by way of the Irish Republic. During the past month or so Britain has been perturbed over a powerful new high-velocity rifle in IRA hands. This is the Armalite or AR-180, perhaps the deadliest light rifle."

On June 10, the *Irish Times* reported:

> "Government officials in London have been making informal but persistent approaches to the Japanese and American governments for help in finding out how the AR-180 Armalite high-velocity rifle is falling into the hands of the I.R.A. in Northern Ireland. . . . Talks have gone on between British and American officials in London, but Armalite say [sic] they have no idea how their rifles are reaching Ireland. The vice-president of the company, however, said yesterday that United States Treasury agents were questioning several dealers in New York as a result of the Armalite gun-running inquires."

See also articles quoted in footnote 24.

the case could not be distinguished "in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law." 378 U. S. at 63 (quoting *McRae, supra* at 87). The policies behind the privilege are equally applicable whether incrimination occurs under laws in the United States or under laws of a foreign country. *Murphy* thus indicates that the privilege should protect against incrimination under the laws of a foreign jurisdiction. Because of the real danger of incrimination and prosecution of petitioners under the law of Great Britain, this case is an appropriate vehicle for resolving this admittedly "certworthy" issue. Cf. *Zicarelli, supra.*

Also presented is the important ancillary question of the extent to which grand jury secrecy, as provided by Rule 6(e) of the Federal Rules of Criminal Procedure,[27] can be said to be an adequate substitute for judicial authority over foreign proceedings. *Murphy* held that the privilege forbids use in any manner by the second jurisdiction of incriminating testimony compelled by the questioning jurisdiction. Because American courts have no authority over law enforcement in another country, however, they could not prevent use of petitioners' grand jury testimony against them in proceedings in Great Britain. The court below concluded that petitioners could be compelled to incriminate themselves under British law, notwithstanding this problem, being of the view that grand jury secrecy was a sure and complete substitute for judicial authority over British proceedings. However, there are innumerable circumstances in which access to grand

[27] Appendix E, *infra*, pp. 33a-34a.

jury testimony can be had, and reliance upon "secrecy" therefore appears unfounded.[28]

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[28] E.g., a witness' compelled grand jury testimony can be used as a basis for a perjury prosecution of him (and the trial court could not order an *in camera* proceeding without violating the alleged perjurer's right to a public trial). The court below termed this "a speculative hypothesis," but more than sixty years ago, this Court in a unanimous opinion, upheld precisely this contention. *Glickstein* v. *United States*, 222 U. S. 139 (1911). *Glickstein* not only established the government's right to use compelled testimony as the basis for a charge of perjury but emphasized the overriding need of the government to be able to conduct such prosecutions, in order to enforce the compulsory testimony legislation employed.

The court below also noted: "The same court which grants immunity is the court which prevents violation of the secrecy. The government represented that it could not violate the secrecy, even under the first sentence of [Rule 6(e)] allowing it to disclose matters in the performance of its duties, without a court order. That is answer enough to the contention of appellants that the government might disclose their testimony." However, as a matter of fact grand jury testimony is regularly disclosed to criminal defendants without court order, pursuant to *Brady* v. *Maryland*, 373 U. S. 83 (1963) and *Jencks* v. *United States*, 353 U. S. 657 (1957). See also 18 U.S.C. §3500. Particularly when this disclosure is made in a proceeding out of the district where the witnesses testified, it is difficult to see how the court in the latter district could prevent disclosure. (In this regard we note that Edward Agramonte, about whom petitioners were questioned, see p. 17, *supra*, has since been indicted in the Southern District of New York for alleged firearms violations under 18 U.S.C. §§921 *et seq.* and 26 U.S.C. §§5841-71).

There will be innumerable reasons for which disclosure of grand jury testimony is required, even apart from the reasons discussed *supra*. Even where the government does not disclose without prior judicial authorization and where a court is aware of the imminent, required disclosure, it is highly questionable whether the court "could protect [petitioners] by refusing to make their testimony available to" other persons. We are unaware of any decisions of this Court upholding such a refusal. This, then, is the real "speculative hypothesis."

3. In a period of increasing use of compulsory testimony legislation, the procedures to be used in employing such legislation take on increasing importance; the failure of the Court below to enforce the procedure mandated by the Department of Justice is inconsistent with *Yellin* v. *United States*, 374 U.S. 109 (1963) and other decisions of this Court.

The Department of Justice manual, *A Practical Handbook of Federal Grand Jury Procedure*, states:

> [I]t is the policy of the Department not to extend immunity in any case unless there are sound and urgent reasons for doing so. An attorney assigned to conduct grand jury proceedings should not take any action under any immunity statute (automatic or claim) without prior consultation with the appropriate Division or section thereof and obtaining approval for such action.[29]

The Department has established guidelines, independent of the requirements of 18 U.S.C. §6003(b) and 28 C.F.R. §0.175, to implement this policy when a government attorney is considering applying to a district court for an order to compel a witness to testify before a grand jury.[30]

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[29] A Practical Handbook of Federal Grand Jury Procedure (1968 ed.), Section 4:3:2, p. 47.

[30] The guidelines are contained in a letter from Richard G. Kleindienst, then Deputy Attorney-General and now Attorney General of the United States, to Hon. Emanuel Celler, Chairman of the Judiciary Committee of the House of Rerpresentatives, which is reprinted in Hearings before Subcommittee No. 5 of the Judiciary Committee of the House of Representatives, 92d Cong., 1st Sess. (November 10, 1971), pp. 68-71. That letter is included in Appendix E, *infra*, pp. 34a-41a.

The guidelines require that a request for permission to make such an application "must" be submitted "in writing" to the Department by the attorney contemplating the application. A request must include a detailed set of facts relevant to the proposed application including the "[r]elative importance of the witness in the criminal activity in the area," a "[b]rief resume of the background of the case or proceeding," and the "[r]easons for the request, including: (a) the witness' part in the matter under investigation; (b) the testimony or information he is expected to be able to give; (c) why he may be expected to invoke the privilege against self-incrimination; (d) how the testimony or information sought may be necessary to the public interest." The request is to be sent to the appropriate Section of the Justice Department, where the attorney who then evaluates the request must prepare a memorandum which is to be "a careful analysis of the benefits and costs of a grant of immunity in the particular case." Finally, the matter is brought before the appropriate Assistant Attorney General who, before authorizing the application, must review both the intital request and the memorandum.

Petitioners' request for a hearing to determine whether the guidelines had been complied with was denied, although government counsel, by his statement on the record that he had not seen the guidelines, has admitted noncompliance.

These guidelines are not mere housekeeping provisions but, rather, a conscious effort to protect a witness from unfortunate consequences that may result from his testifying, notwithstanding a grant of immunity adequate to protect his Fifth Amendment interests. The guidelines expressly require an evaluation of the possible "unfortunate collateral consequences," citing as an example, "physi-

cal reprisals." They also mandate an evaluation of "special circumstances, such as a close family relationship between the witness and the defendant" which may make compulsion of testimony "inequitable." The guidelines are thus for the benefit of the witness; compliance therewith may protect him from being compelled to testify and thereby exposed to undesirable consequences.

It is well established that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and . . . this principle holds even when the administrative action under review is discretionary in nature." *Service* v. *Dulles,* 354 U. S. 363, 372-73 (1957). See also *United States ex rel. Accardi* v. *Shaughnessy,* 357 U. S. 260 (1954). In his opinion for four justices in *Vitarelli* v. *Seaton,* 359 U. S. 535, 546-47 (1959), Justice Frankfurter joined "unreservedly" in the majority's reaffirmation of *Shaughnessy* and *Service*:

> An executive agency must be rigorously held to the standards by which it professes its action to be judged. . . . Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. . . . This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

That Department of Justice guidelines are judicially enforecable was firmly established by this Court in *Petite* v. *United States,* 361 U. S. 529 (1960) and *Redmond* v. *United States,* 384 U. S. 264 (1966). The decisions of this Court also make clear that the failure of the government to comply with its own rules in seeking testimony from a

witness before an investigatory body is a defense to a charge of contempt for refusal to answer the questions posed. *Yellin* v. *United States,* 374 U. S. 109 (1963); *Gojack* v. *United States,* 384 U. S. 702 (1966). Whether or not compliance with the defined procedure would necessarily have resulted in a decision not to seek the testimony of petitioners, they were "at least entitled to have the [Department of Justice] follow its rules and give [them] consideration according to the standards it has adopted in [the guidelines]." *Yellin* v. *United States,* 374 U. S. at 117-118, 121.[31]

We are in a period of sharply increasing use of compulsory testimony provisions. At such a time, and when the view of the lower courts is at odds with *Yellin* and the other authorities cited *supra,* this Court should clarify the procedures to follow in employing such provisions.

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[31] In addition to the consequences of being compelled to testify noted in the guidelines, there exist the "inherent cruelty" of that compulsion and other economic or civil disabilities. *In re Vericker,* 446 F. 2d 244, 247 (2 Cir., 1971); *In re Bart,* 304 F. 2d 631, 634-35 (D. C. Cir., 1962). A witness thus has a substantial interest in not being forced to testify.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment and opinion of the court below.

Respectfully submitted,

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October, 1972

[APPENDICIES FOLLOW]

APPENDIX A

Opinion and Judgment of the Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2333
Summary Calendar*

IN RE KENNETH TIERNEY

No. 72-2399
Summary Calendar*

IN RE PASCHAL MORAHAN
IN RE DANIEL CRAWFORD
IN RE MATHIAS REILLY
IN RE THOMAS LAFFEY

Appeals from the United States District Court for the Northern District of Texas

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(August 3, 1972)

Before BELL, DYER and CLARK, Circuit Judges.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F. 2d 409.

Appendix A

BELL, Circuit Judge: These cases are consolidated for appeal. Appellants are incarcerated under adjudications of civil contempt for failing to testify before a federal grand jury after having been accorded use immunity under 18 USCA, §§ 6002, 6003.[1] The incarceration is pursuant

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[1] § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order

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Appendix A

e 18 USCA, § 1826.[2] The appeals are subject to the statu-

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equiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

[2] § 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

tory thirty day requirement of 18 USCA § 1826(b). The record and briefs were filed on short notice in order to comply with the statute. For reasons stated in our order of July 25, 1972, we extended the expiration date of the thirty day period in No. 72-2333 from July 26, 1972 to August 4, 1972, which is the statutory expiration date in No. 72-2399. [Order attached as Appendix "A"].

There are six assignments of error. They are common to each appellant. The two principal assignments center on (1) the alleged refusal of the district court to permit appellants to consult with counsel while being questioned before the Grand Jury, and (2) the contention that use immunity was insufficient protection under the Fifth Amendment privilege against self-incrimination because of the possibility of prosecution in Great Britain. Two additional assignments are (1) that because the government failed to negate sufficiently a claim of electronic surveillance, appellants were justified in refusing to testify; and (2) that the Department of Justice failed to follow its guidelines in applying to the district court for orders to compel appellants to testify. The other assignments of error go to the conduct of the proceedings in the district court: (1) that appellants were not afforded adequate notice and a meaningful opportunity to prepare for the hearings on the applications of the government for the compulsory testimony orders and for the subsequent contempt proceedings; and (2) the trial judge demonstrated such partiality as to require his disqualification under due process standards and the federal supervisory power. We affirm.

Appendix A

I.

The facts of record disclose that appellants appeared before the grand jury in Forth Worth, Texas, in response to subpoenas. They are residents of New York and were accompanied by counsel upon their arrival at Fort Worth. Tierney was the first of the five appellants to be called before the grand jury. The pattern of his conduct before the grand jury and the general proceedings thereafter with respect to each appellant are similar to the extent that we may consider all as being in the same factual posture for the purpose of considering the issues presented by the appeals.

Several questions were propounded to Tierney. The only one answered was as to the correctness of his name. Each question concerned a matter relevant to the investigation.[3] They had to do with whether the witness (and this applies to each of appellants) had purchased firearms on certain dates and at certain places, whether they had used the driver's license of any other individual for the purpose of identification in purchasing firearms, whether their own driver's license had been loaned to others for that purpose, and whether they had any knowledge of any person or persons in this country who were engaged in the illegal purchase of weapons and explosives. Tierney sought permission to consult with

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[3] The grand jury was investigating possible violations of Title I of the Gun Control Act of 1968 (18 U.S.C. § 921 et seq.); Title II of the Gun Control Act of 1968 (76 U.S.C. § 5861); Title XI of the Organized Crime Control Act of 1970 (18 U.S.C. § 842 et seq.); Foreign Agents Registration Act (22 U.S.C. § 611 et seq.), and conspiracy (18 U.S.C. § 371).

attorneys before answering the questions and permission was granted or taken, depending on how one reads the transcript of the event. In either case, after conferring with his attorneys, he refused to answer each question, claiming protection under the First, Fourth, Fifth, Sixth, and Ninth Amendments to the Constitution and the United States Code.

At this stage, as to each appellant in turn, there was a proffer of immunity as required under § 6003, supra. After hearing, immunity was granted to each of the appellants by the district court in written orders.

Each appellant was then instructed to answer the questions propounded by the grand jury. Each, in turn, refused. The government moved to have them adjudicated in civil contempt and, after hearings, such a result ensued. Bail was denied by the district court and by this court. These appeals followed.

II.

The first assignment of error rests on the contention that appellants were denied their Sixth Amendment right to effective assistance of counsel and their Fifth Amendment right to due process of law through the denial to them of their right to consult with counsel before answering questions propounded to them before the grand jury. The difficulty with the position of appellants is that the record does not make out a denial of counsel.

Appellants were in fact permitted to consult with counsel during their appearances before the grand jury with respect to the questions propounded. This opportunity was granted by the foreman of the grand jury on re-

quest from each of the appellants, and we do not perceive that the district court has ruled to the contrary. Such remarks as the district court made with regard to consultation with counsel were in the beginning of the proceedings and were directed to preventing an abuse of the privilege of consultation. The court was specific in stating that appellants were not to leave the grand jury room without permission from the foreman. It was implicit, of course, and in practice it developed that appellant could leave for consultation upon being granted permission by the foreman. The record is clear that permission was freely granted by the foreman although not after each question. There was some reluctance to let Tierney leave the grand jury room to consult counsel but none whatever as to the other four appellants. Each was granted permission by the foreman to so consult, and usually after two and at no time after more than three questions had been propounded.

It goes without saying that the district court had the power to prevent a breakdown in the grand jury proceedings by frequent departures from the grand jury room for frivolous reasons and with intent to frustrate the proceedings. On the other hand, the privilege of consulting with counsel can be accommodated to the grand jury proceedings as was done through cooperation between the witness and the foreman of the grand jury.[4]

In sum, we need not reach the question of a right, and if a right, the extent thereof, of a witness before a grand

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[4] Government counsel could facilitate the proceedings by making a set of questions available at one time to the witness so that they might be discussed as a group with counsel.

jury who has been granted immunity to consult with counsel outside the presence of the grand jury. It is sufficient to say that here appellants were not denied the right to consult with counsel. They were accorded such a right and, after consultation, refused in every instance to answer.

III.

The next assignment of error concerns the extent of the reach of use immunity as provided under § 6002, supra. The position of appellants is that they are entitled to protection under the Fifth Amendment from possible incrimination as to crimes under the laws of Great Britain through answers given to the questions propounded to them before the grand jury. Their position is that use immunity is insufficient to afford them protection from such foreign prosecution. Whether the reach of the Fifth Amendment is such as to protect against foreign prosecution is an open question and we need not reach it in this case. The question was presented to the Supreme Court in *Zicarelli* v. *The New Jersey State Commission of Investigation*, 1972, —— U. S. ——, —— S. Ct. ——, 32 L. Ed. 2d 234, but was not answered. There the court concluded that Zicarelli could be adequately safeguarded from foreign prosecution by limitations on the questions to be propounded to him. No substantial risk of foreign prosecution was posed. We are of a like view in these cases but for a different reason. We adhere to the reason given in denying appellant Tierney's motion for bail.

Our view then and now is that because of the secrecy of the grand jury proceedings no substantial risk of for-

eign prosecution is posed. Rule 6(e), F.R. Crim. P., provides for this secrecy.[5] The same court which grants immunity is the court which prevents violation of the secrecy. The government represented that it could not violate the secrecy, even under the first sentence of allowing it to disclose matters in the performance of its duties, without a court order. This is answer enough to the contention of appellants that the government might disclose their testimony.

The Tenth Circuit rejected a similar claim on the following reasoning, which we find to be apt, although the appeal was later ordered dismissed as being moot. *In Re Parker*, 10 Cir., 1969, 411 F. 2d 1067, vacated and remanded for dismissal as being moot, *Parker* v. *United States*, 1970, 397 U. S. 96, 90 S. Ct. 819, 25 L. Ed. 81.

> "Rule 6(e), Fed.R.Crim. P., with an exception not applicable herein, prevents disclosure of matters occurring before the grand jury unless other-

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[5] Rule 6(e), F.R.Crim.P.:

> Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

> wise ordered by a federal court and since for a court to so order under the circumstances presented in the subject case would defeat one of the purposes for grand jury secrecy, i.e. the encouragement of free disclosure by those who have information of crimes, United States v. Proctor & Gamble Co., 356 U. S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077, as well as the court's 'promise' of immunity, it cannot be assumed that a court would grant such an order or accordingly that there is a danger of incrimination. By virtue of the application of Rule 6(e) any evidence, inculpatory or otherwise, related by appellant during the grand jury proceeding, would be unavailable to the Canadian government in either an extradition proceeding in the United States or in a criminal proceeding in Canada." 411 F. 2d at 1069-70.

Appellants point to specific circumstances where it might be necessary to disclose the testimony of appellants, one where it became necessary in the defense of another, and the other in showing derivative use of testimony given under immunity. The answer is that the court granting immunity could protect appellants by refusing to make their testimony available to defendants in other cases, where it is shown to be necessary to the defense, although the refusal might lead to an acquittal. The court could control any problem as to derivative use of the testimony by an in camera proceeding.

Appellants also argue that secrecy would be breached in the event their testimony was used to impeach them or in perjury proceedings against them. Again the initial protection would come from an in camera proceed-

ing. Thereafter, if impeachment or a perjury prosecution should seem indicated to the district court, the question would arise as to whether the scope of the Fifth Amendment embraces protection against perjury or impeachment. We will not now rule on such a speculative hypothesis but cf. *Kastigar* v. *United States,* 1972, —— U. S. ——, —— S. Ct. ——, 32 L. Ed. 2d 212, on the limit of the Fifth Amendment privilege. See also *Harris* v. *New York,* 1971, 401 U.S. 222, 225, 91 S. Ct. 643, 28 L. Ed. 1; *United States* v. *Knox,* 1969, 396 U. S. 77, 90 S. Ct. 363, 24 L. Ed. 2d 275. It is sufficient to say that this hypothesis does not make out a substantial risk of foreign prosecution.

We do not consider the government's argument that appellants would be protected by a refusal to grant extradition. No treaty protection based on the extension immunity has been called to our attention. Thus, a refusal to extradite, assuming Fifth Amendment protection from foreign prosecution, would be of little solace to one who might wish to travel to Great Britian.

IV.

Relying on *Gelbard* v. *United States,* 1972, —— U. S. ——, —— S. Ct. ——, —— L. Ed. 2d —— (40 L. W. 4862), appellants contend that they were entitled to refuse to answer the questions propounded to them before the grand jury because of the intervention of a claim of illegal electronic surveillance of them and their counsel. Their position is not so much that there has been electronic surveillance but that the government's denial of electronic surveillance is inadequate. The dis-

trict judge assumed standing to raise the illegal electronic surveillance claim. We hold that they do have such standing.

Nevertheless, here again, the claim falls under the weight of the facts as disclosed by the record. The testimony for the government was that the Department of Justice had checked with every government agency that had any connection with the investigation and this included the Department of Treasury, which includes Secret Service, Customs, Internal Revenue Service, Alcohol, Tobacco and Firearms Division; the Bureau of Narcotics and Dangerous Drugs, and the Federal Bureau of Investigation, and found that there had been no electronic surveillance of appellants nor of their counsel. This testimony was given under oath, and counsel was subjected to cross examination.

It is the position of appellants that this denial was inadequate because it was hearsay, their argument being that the person who actually made the check should have testified or should have filed an affidavit. The denial was adequate. See *United States* v. *Reynolds,* 9 Cir., 1971, 449 F. 2d 1347, 1351; *In Re Russo,* 9 Cir., 1971, 448 F. 2d 369, 374.

Appellants also state that the testimony did not make it clear that there had been no electronic surveillance of the telephones listed to appellants and their counsel. We reject this contention. The testimony is to the contrary.

It is also urged that the denial was inadequate because there was no report from the Central Intelligence Agency, nor from the Departments of State and Defense.

This was unnecessary in view of the testimony that reports had been obtained from every agency having anything to do with the investigation in process.

It now appears that there was an overhear of one of counsel for appellants on June 17, 1972 and that this did not come to the attention of government counsel until July 18, 1972 after the matters on appeal were concluded in the district court. This overhear was called to our attention in the brief of the government. The overhear was on a telephone which was not the subject of inquiry in the district court. It was incidental to a surveillance authorized by court order under 18 USCA, § 2518. Counsel made a call to the telephone under surveillance. The court issuing the order has by further order made its surveillance order, the pertinent log of calls over the telephone in question, and the transcript of the particular conversation of counsel available to us for in camera examination. We have made an in camera examination of the transcript of this overhear. It contains nothing of evidentiary substance nor does it in anywise have to do with the right to counsel or the adequacy of representation by counsel. This incident does not afford a basis for the refusal of appellants to testify before the grand jury.

V.

The next assignment of error has to do with the alleged failure of the Department of Justice to follow its own guidelines in applying to the district court for orders to compel appellants to testify. This failure is said to have rendered invalid the orders of the district court to testify and thus the judgments of contempt for disobedience of those orders.

We are unable to discern any merit in the supposed departure from the guidelines. The Acting Assistant Attorney General in charge of the Internal Security Division of the Department of Justice authorized the seeking of the grants of use immunity by the United States Attorney and recited that the testimony sought was necessary and in the public interest. This was in compliance with the statutory requirements. § 6003, supra.

The guidelines on which appellants rely are directed to the handling of requests by United States Attorneys within the Department of Justice for permission to seek orders granting immunity. They are not directed to the procedural or substantive rights of prospective witnesses.

VI.

We come now to the claimed procedural due process defalcations in the district court. The first of these has its genesis in the contention that appellants were not given adequate notice and a meaningful opportunity to prepare for the hearings on the applications for compulsory testimony orders and for the contempt proceedings. They allege that Rule 6(d) of the F.R.Civ.P.[6] was

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[6] F.R.Civ.P., Rule 6(d):

> For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

violated in that they were not given five days notice before the time specified for the hearings. That rule, assuming its applicability to proceedings such as these, contains an exception for allowing a different time to be fixed by the court. This exception would hardly be more appropriate than in the proceedings having to do with the progress of matters before a grand jury. A case in point is *United States* v. *Weinberg*, 9 Cir., 1971, 439 F. 2d 743. This assumes a sufficient amount of time or notice for counsel to be able to represent their clients adequately, and the record is clear that the times in question here were more than ample. There is no suggestion of prejudice from the shortened times utilized by the district court.

Lastly, appellants charge the district court with partiality to the government and hostility to counsel for appellants in its handling of these proceedings. We have studied the entire record. Our conclusion is that the district court was engaged in handling a difficult and technical matter where experienced counsel were representing appellants with the end in mind of taking full advantage, as was their right, of every available legal means to prevent appellants from having to give testimony to the grand jury. The district court made it clear in the beginning that he would exercise firm control of the situation. This was the duty of the district court. The district court is more than an umpire; the court has full responsibility for the orderly administration of proceedings before it. The record is entirely bereft of a showing of partiality to the government, or of hostility to counsel. Appellants and their counsel were accorded courteous treatment throughout the continuous period of the handling of this matter—from June 18 until July 3, 1972.

Appendix A

Every available procedural right for the protection of appellants was employed. No line of testimony has been given. The conduct of the district court throughout was firm, patient, meticulous and impartial. The complaint against the district court is without merit.

AFFIRMED.

APPENDIX B

Excerpted Findings of Fact and Conclusions of Law in *In re Tierney*, Misc. No. 52 (N.D. Tex.) and *In re Morahan, et al.*, Misc. Nos. 54-57 (N. D. Tex.)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In Re:

Misc. Docket No. 52

KENNETH TIERNEY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The United States filed in open court the sworn application of Eldon B. Mahon, United States Attorney for the Northern District of Texas, alleging that the witness Kenneth Tierney was in contempt of this Court. An evidentiary hearing was held on such application with the witness, Kenneth Tierney, and his three attorneys from New York and United States Attorney Eldon B. Mahon, Assistant United States Attorney, Frank D. McCown, and Special Attorneys Brandon Alvey and Robert W. Merkle, present and participating.

After considering the evidence and the arguments of counsel, the Court finds and concludes:

Appendix B

Findings of Fact

1. Witness Tierney was served with a subpoena on June 13, 1972, in New York City, to appear and testify at Fort Worth, Texas, on June 19, 1972, before a duly constituted grand jury of this Court.

• • •

7. Attorneys, Brandon Alvey and Robert W. Merkle, are attorneys employed by the Department of Justice assigned to the Internal Security Division and were lawfully appointed Special Attorneys for the purpose of conducting, in the Northern District of Texas, a grand jury investigation concerning possible violations of Title I of the Gun Control Act of 1968 (18 U.S.C. 921 et seq.), Title II of the Gun Control Act of 1968 (26 U.S.C. 5861), Title XI of the Organized Crime Control Act of 1970 (18 U.S.C. 842 et seq.), Foreign Agents Registration Act (22 U.S.C. 611 et seq.), and conspiracy (18 U.S.C. 371).

• • •

29. When Special Attorney Alvey was on the stand, defense counsel sought to elicit from him details about the nature of the investigation. The Court sustained an objection to that line of interrogation. As will be discussed a little more fully later, it is inconceivable that counsel had not been able to find out from the three witnesses who have hired them in this matter what the subject matter of the investigation is. Witnesses would not likely go to the expense of hiring three skilled attorneys to travel from New York to Fort Worth to help keep them from giving grand jury testimony if they had

no idea what the investigation was about. If there was any doubt in the lawyer's [sic] minds, it ought to have been removed when they learned that the grand jury attempted to interrogate the witness about the purchase of weapons apparently on more than an isolated scale. The Court finally concluded that the witness' lawyers were not seeking information for themselves, but wanted to get into the record what the investigation was all about. The reason for such desire is not clear; but the Court could see the possibility that counsel might be trying to lay a predicate for claiming that the immunity granted under 18 U.S.C. 6002 is inadequate in this case, because the investigation has international overtones, and the immunity would not protect the witness from prosecution in a foreign country.[b] Since the Court had refused to permit interrogation of government lawyers about the matter, and since counsel obviously did not want the witness to give any information, it permitted his counsel to state into the record for what it might be worth a summary of newspaper reports on the proceedings. If those reports have any value, they indicate that the grand jury inquiry is about an extensive scheme to gather weapons in this country to be smuggled to the Irish Republic Army in Northern Ireland. The fact that the Special Attorneys from the Department of Justice conducting this investigation are assigned to matters involving terrorist activities could support the news reports. This inference is

[b] The Court does not mean to intimate that it considers that there is any merit to this question. One reason would be that the witness could not be extradited to a foreign country for prosecution unless the United States agreed to it. It is inconceivable that our government would give such consent when it might defeat a grant of immunity given by it.

drawn without taking into consideration that even with the short notice given of the grand jury meeting, reporters from London, England news media are covering these proceedings.[e]

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VI.

Judgment should be entered decreeing that the witness Kenneth Tierney is in civil contempt of this Court for his wilful refusal to answer questions properly propounded to him during the June 20, 1972 regular session of the grand jury impaneled by this Court, and that the witness should be committed to the custody of the United States Marshal of the Northern District of Texas until he purges himself of such contempt or until the aforesaid grand jury is discharged, whichever occurs first.

Signed, June 23, 1972.

(s) LEO BREWSTER
Judge

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[e] This is known from the fact that persons purporting to cover court proceedings here are required to establish their identity with the court staff. That is primarily because representatives of the news media are admitted to a place provided for them inside the rail in the courtroom.

Appendix B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In Re:

PASCAL MORAHAN — Misc. Docket No. 54

In Re:

DANIEL CRAWFORD — Misc. Docket No. 55

In Re:

MATHIAS REILLY — Misc. Docket No. 56

In Re:

THOMAS LAFFEY — Misc. Docket No. 57

GENERAL SUMMARY

Pascal Morahan, Daniel Crawford, Mathias Reilly and Thomas Laffey were each held in civil contempt of this Court for failure to obey its order, entered after a grant of immunity under Title 18, United States Code, Sections 6001, 6002 and 6003, directing him to testify before a grand jury of this Court then in regular session. Each one of them was committed to the custody of the United

Appendix B

States Marshal of this District until he purged himself by giving his testimony, or until the grand jury was finally discharged, whichever happened first.

• • •

The Government has not disclosed the exact nature of the transaction being investigated. Counsel for the witnesses claim that it is one involving the purchase of weapons for shipment to the Irish Republican Army in Northern Ireland. There are some circumstances which support the inference that the investigation involves a gun-running conspiracy to collect firearms to be smuggled to the I.R.A. Some of the questions propounded to the witnesses related to whether they had made illegal purchases of any firearms, or had loaned their drivers' licenses to others for use in making such purchases. There were several tirades by one of counsel for the witnesses against the conduct of the British in Northern Ireland. Representatives of the British news media have personally covered all of the proceedings involving Tierney as well as these witnesses. Irish people in the United States on visas have picketed the courthouse during this hearing.

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FINDINGS OF FACT

1. All the witnesses were served with subpoenas during the period beginning with June 13, 1972, and ending with June 16, 1972.

• • •

5. Attorneys Brandon Alvey and Robert W. Merkle are attorneys employed by the Department of Justice assigned

to the Internal Security Division, and were lawfully appointed Special Attorneys for the purpose of conducting, in the Northern District of Texas, a grand jury investigation concerning possible violations of Title I of the Gun Control Act of 1968 (18 U.S.C. 921 et seq.), Title II of the Gun Control Act of 1968 (26 U.S.C. 5861), Title XI of the Organized Crime Control Act of 1970 (18 U.S.C. 842 et seq.), Foreign Agents Registration Act (22 U.S.C. 611 et seq.), and Conspiracy (18 U.S.C. 371). One of their specialities [sic] is matters involving terrorist activities.

• • •

CONCLUSIONS OF LAW

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In view of the decision in the *Kastigar* case in May, 1972, counsel for the witnesses could not well argue that the immunity granted under Title 18, United States Code, Sections 6002 and 6003, was constitutionally inadequate in prosecutions or grand jury investigations involving violations of the laws of this country. They therefore say that the immunity is inadequate to protect them against prosecutions in foreign countries. It has been pointed out that there is actually no proof that the present investigation relates to any matters which would constitute violations of the laws of foreign nations; but the point will be noticed briefly.

The only case which has been found where this point was actually decided is In re Parker, 10 Cir., 411 F. 2d

1067, 1070 (1969). That case became moot[15] while a petition for certiorari was pending, and the judgment in it was therefore necessarily vacated and remanded for dismissal of the action. However, the following reasoning in that case on this question is sound:

> ". . . The Fifth Amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation. The ideology of some nations considers failure itself to be a crime and could provide punishment for the failure, apprehension, or admission of a traitorous saboteur acting for such a nation within the United States. In such a case the words 'privilege against self-incrimination,' engraved in our history and law as they are, may turn sour when triggered by the law of a foreign nation."

• • •

V.

Judgment should be entered decreeing that each witness, Pascal Morahan, Daniel Crawford, Mathias Reilly and Thomas Laffey, separately is in civil contempt of

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[15] It would naturally be expected that there would be a higher percentage of moot cases in this type of proceeding than in most others, because so many things could happen to make them moot. The witness could decide to testify. The Government could decide it did not need the testimony of the witness. The grand jury could be discharged.

this Court for his knowing, deliberate and wilful refusal to answer questions properly propounded to him during the June 27, 1972, regular session of the grand jury impaneled by this Court, and that each such witness should be committed to the custody of the United States Marshal of the Northern District of Texas until he purges himself of such contempt or until the aforesaid grand jury is discharged, whichever occurs first.

Signed, July 3, 1972.

(s) LEO BREWSTER
Judge

APPENDIX C

Order of Mr. Justice Douglas

SUPREME COURT OF THE UNITED STATES
Nos. A-49 and A-80

KENNETH TIERNEY, MATHIAS REILLY, DANIEL CRAWFORD, THOMAS LAFFEY and PASCHAL MORAHAN,

Petitioners,

v.

UNITED STATES.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners and the opposition of the Solicitor General thereto,

IT IS ORDERED that the petitioners be, and they are hereby, released on bail in such form and amount as the United States District Court for the Northern District of Texas determines appropriate. Such release on bail is further conditioned upon the timely filing of a petition for a writ of certiorari in the above-entitled cause. Should such a petition be so timely filed, this order is to remain in effect pending this Court's action on the petition. If the petition for a writ of certiorari is denied, this order is to terminate automatically. In the event the

petition for a writ of certiorari is granted, this order is to remain in effect pending the sending down of the judgment of this Court.

(s) W. O. DOUGLAS
Associate Justice of the Supreme
Court of the United States

Dated this 12th day of September, 1972.

APPENDIX D

Opinion of Mr. Justice Douglas

SUPREME COURT OF THE UNITED STATES

Nos. A-49 and A-80

KENNETH TIERNEY,

A-49 *v.*

UNITED STATES.

MATHIAS REILLY, *et al.*,

A-80 *v.*

UNITED STATES.

Applications for Bail.

[September 12, 1972]

Mr. Justice Douglas, Associate Justice:

These are applications for bail which raise the questions comparable to those presented in *In re Beverly*, A-31, in which I granted bail.

In the present cases there was electronic surveillance of a telephone which a court had approved pursuant to

18 U.S.C. § 2518. During that surveillance a conversation of petitioners' attorney was intercepted.

Petitioners were testifying before a grand jury having been granted immunity under 18 U.S.C. § 6002 and § 6003. On refusing to answer certain questions propounded, they were committed for civil contempt.

The standard for bail in civil contempt proceedings is set forth in 28 U.S.C. § 1826(b) which specifies that bail shall be granted if the issues are not frivolous and if the appeal is not taken for delay. Here the immunity granted the petitioners was a so-called "use" immunity as distinguished from the "transactional" immunity which some of us thought was required when the issue was before us last Term in *Kastigar et al.* v. *United States,* 406 U. S. 441.

It is now argued that petitioners have obtained all the immunity to which they were constitutionally entitled and that there is no longer an attorney-client privilege to be protected. Hence it is argued that the Sixth Amendment right to counsel which weighed heavily with me in *Russo and Ellsberg* v. *Byrne* (in which I granted a stay on July 29, 1972) is not relevant here.

I accept of course the Court decision that only "use" immunity, not "transactional" immunity, is the constitutional standard under the Fifth Amendment. The fact remains, however, that the "leads" obtained from testimony given after the "use" immunity has been granted can be used to indict and convict the petitioners. It seems to me therefore that the attorney-client privilege does continue and indeed may be much more vital to the petitioners than it would have been had the "transactional" immunity been the one adopted by the Court.

Appendix D

The question remains whether a search warrant issued for electronic surveillance under the Fourth Amendment can invade the domain of the Sixth Amendment and destroy the attorney-client relation. That is an exceedingly serious question on which this Court has not spoken.

Beyond those two questions there is a further one—whether on the issue of relevance an *in camera* proceedings is adequate or whether an adversary hearing is required. That is the question central to both *Russo* and *Ellsberg*, to *In re Beverly*, and to the present two cases.

Hence in spite of the fact that my Brother Powell has heretofore denied bail in these cases, I have reluctantly concluded that the requisite for bail in civil contempt cases, 28 U.S.C. § 1826(b), has been satisfied here.

APPENDIX E

Statutes, Rule and Guidelines Involved

28 U.S.C. § 1826. Recalcitrant Witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

Appendix E

18 U.S.C. § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order

requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

F.R.Crim.P. 6(e) Secrecy of Proceedings and Disclosure.

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be im-

posed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Letter Submitted to Hon. Emanuel Celler, Chairman, Judiciary Committee of House of Representatives by Deputy Attorney-General Richard G. Kleindienst, Dated November 30, 1971, in Hearings before Subcommittee No. 5 of the Judiciary Committee, 92d Cong., 1st Sess., pp. 68-71.

November 30, 1971

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: When Associate Deputy Attorney General Wood testified on November 10 before Subcommittee No. 5 of your Committee on H.R. 2589, H.R. 8829, and 10689, a number of questions concerning juries were raised to which you requested the Department of Justice supply answers for the record.

A number of questions were raised in connection with Mr. Wood's testimony recommending that H.R. 10689, which would make it a crime for an employer to fire an employee for his Federal jury service, be amended to provide instead for a civil penalty. As Mr. Wood indicated in his testimony, the Department of Justice contemplated that a civil action would be instituted by the Department of Justice and that the penalty would be

paid to the United States rather than to the juror. In order to accomplish this, language patterned after section 9 of the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. 1678, could be used. Some concern was expressed at the hearings that a civil penalty statute should specifically provide who the parties to the action would be and to whom the penalty would be paid. If the language were patterned after the section cited, this would not be necessary. There would, of course, be no harm in specifying the parties and the recipient of the fine in the statute.

Mr. Wood was also asked whether it would be desirable to have an action brought for the employee's benefit rather than for a penalty accruing to the United States. He indicated that the Department's concern was only that the penalty not be criminal, and that it might be possible to provide for a civil penalty which would benefit the employee himself. The Department of Justice defers to the judgment of your Committee as to the most appropriate civil remedy for the problem of jurors fired for Federal jury service.

Mr. Wood was also asked whether there had been any challenges to the exclusion of 18 to 21-year olds from jury service. In *United States* v. *Tantash*, 409 F. 2d 227 (9th Cir., 1969), cert. denied, 395 U. S. 968, a defendant convicted of failure to report for induction argued unsuccessfully that exclusion of minors from his jury panel violated his constitutional rights. More recently, in *United States* v. *McVean*, 436 F. 2d 1120 (5th Cir., 1971), decided January 14, 1971 (although the offense occurred prior to passage of the legislation relating to 18-year old voters), the Court held in a case involving con-

viction of a person under 21 for unlawful possession and sale of a hallucinogenic drug that the defendant was not deprived of any rights under the fifth and sixth amendments to the Constitution by the congressional limitation of eligibility for jury service to those 21 years old or older. The Supreme Court has recently denied certiorari. See also *United States* v. *Butera*, 420 F. 2d 564 (1st Cir. 1970).

You and Congressman Mikva asked a number of questions concerning grand jury investigations. There are no written guidelines for the conducting of these investigations, except in the area of granting of immunity. Those guidelines provide that:

> "All requests for approval of immunity applications must be submitted in writing, allowing a[t] least two weeks whenever possible for consideration and processing, and should include the following information:
>
> "1. Name of the prospective witness for whom immunity is requested.
>
> "2. Date and place of birth, if known.
>
> "3. FBI and local police number, if any.
>
> "4. Residence address.
>
> "5. Name of employer or company with which he is associated.
>
> "6. Relative importance of the witness in the criminal activity in the area.
>
> "7. Whether a check of pertinent state and Federal offices in the area reveals the existence of

any charges pending against the witness, and, if so, the nature of the charges.

"8. Whether the witness is currently incarcerated, and, if so, under what conditions and for what length of time.

"9. Docket number of the case in which the witness's testimony or information is sought, or matter number involved in the grand jury proceeding.

"10. Brief resume of the background of the case or proceeding.

"11. Reasons for the request, including:

"(a) the witness's part in the matter under investigation.

"(b) the testimony or information he is expected to be able to give.

"(c) why he may be expected to invoke the privilege against self-incrimination.

"(d) how the testimony or information sought may be necessary to the public interest.

"12. Estimation of whether the witness is likely to testify or produce information if immunity is granted.

"13. Estimation of what Federal and state offenses on the part of the witness may be disclosed if the witness testifies or produces information under the grant of immunity."

When a request for an authorization to apply for an immunity grant is sought, it is sent to the appropriate

Appendix E

Section of the Criminal Division, to which the following guideline applies:

> "In evaluating the request from the United States Attorney, you should view the information supplied by him as the starting point, and not the end, of analysis. Your memorandum to me should include not only factual recitals and your conclusions but a careful analysis of the benefits and costs of a grant of immunity in the particular case; How strong would the Government's case be without the testimony of the prospective witness? How strong with it? How likely is it that the witness will refuse to testify even if ordered to do so by the court? Would there be an effective sanction against this contemptuous conduct if it occurred? Would we be willing to employ such a sanction, or might special circumstances, such as a close family relationship between the witness and the defendant, make it inequitable to do so? Might the witness's compelled testimony lead to unfortunate collateral consequences, such as physical reprisals by the defendant? How likely is it that the witness will commit perjury? Could we bring an effective prosecution against him if he did? Can the examination of the witness be effectively confined, or might we be conferring immunity for a broad range of past criminal conduct? None of these questions are necessarily decisive, but any of them may become relevant. Even when the United States Attorney's request seems complete on its face, it may be desirable to discuss the case with him by telephone to be sure that all issues of law, tactics, and policy have been considered."

The material developed pursuant to these guidelines is then reviewed by the Assistant Attorney General for the Criminal Division.

With respect to your question concerning who decides whether to conduct a grand jury investigation, the answer depends upon the law involved in the investigation. Grand jury investigations concerning antitrust, tax and internal security matters must be approved by the respective Assistant Attorney General, and antitrust matters also require the approval of the Attorney General. Prior approval must be obtained from the Civil Rights Division before presenting cases under the civil rights, peonage, slavery, or involuntary servitude statutes to a grand jury for investigation or indictment. As far as the Criminal Division is concerned, no prosecution may be instituted under the following statutes without specific authorization of the Criminal Division:

Antiracketeering cases not involving the use or threat of force or violence, 18 U.S.C. 1951.

Antiriot cases, 18 U.S.C. 245(b)(3).

Civil Rights Act of 1960; violations of Act arising out of labor disputes or statutes assigned to Criminal Division.

Contempt of Congress, 2 U.S.C. 194.

Copyright law, 17 U.S.C. 104 and 105.

Desecration of the flag, 18 U.S.C. 700.

False statements to Federal investigators, 18 U.S.C. 1001.

Federal election laws.

Appendix E

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401-531.

Loansharking statutes, 18 U.S.C. 891 et seq.

Purchase and sale of public office, 18 U.S.C. 214, 215.

Railway Labor Act, 45 U.S.C. 152 and 181.

Security Act, Securities Exchange Act and Investment Advisers Act of 1940, as amended (15 U.S.C. 77a et seq.; 15 U.S.C. 78a, et seq.; 15 U.S.C. 80b-1, et seq.), except where violations are brought to the attention of U. S. Attorneys by the Securities and Exchange Commission.

Selective Service matters in the following types of cases only:

1. Second delinquency cases involving subjects who have been previously prosecuted under the Act and have served sentences;

2. Counseling, aiding and abetting evasion or refusal;

3. Mutilation of Selective Service certificates. Strikebreakers statute, 18 U.S.C. 1231.

Unlawful possession or receipt of firearms; cases arising under section 1202(a) of Title VII of Public Law 90-351, the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

White Slave Traffic Act (18 U.S.C. 2421, et seq.), non-commercial cases.

Appendix E

Wiretapping and electronic surveillance; cases arising under Title III of P.L. 90-351, the Omnibus Crime Control and Safe Streets Act of 1968.

The United States Attorney may initiate grand jury investigations on his own in areas not covered above. Also, of course, the Attorney General becomes involved in the decision whether to institute grand jury proceedings in particularly important or significant cases.

I am returning, corrected, the transcript of Mr. Wood's testimony. Thank you for having afforded us an opportunity to make corrections.

Sincerely,

RICHARD G. KLEINDIENST
Deputy Attorney General

Certificate of Service

This is to certify that three (3) copies of the aforegoing petition for writ of certiorari have been served by certified mail upon Erwin Griswold, Solicitor-General of the United States, Department of Justice, Washington, D. C. 20530, this 19th day of October, 1972.

JAMES REIF
Attorney for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-623

KENNETH TIERNEY, PETITIONER

v.

UNITED STATES OF AMERICA

MATHIAS REILLY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 465 F. 2d 806. The opinion of the district court (Pet. App. 17a-25a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1972. The consolidated petition for a writ of certiorari was filed on October 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below properly determined *ex parte* and *in camera* that an overhearing of a defense lawyer in the course of a court-authorized electronic surveillance, which was not directed at petitioners or their attorneys, was unrelated to petitioners' attorney-client relationship and therefore did not have to be disclosed.

2. Whether petitioners would be subject to a substantial threat of foreign prosecution on the basis of grand jury testimony that has been sought from them under a grant of "use immunity."

3. Whether petitioners have any ground to challenge the procedures by which the Department of Justice determined to apply for a judicial conferral of "use immunity" on them.

STATEMENT

After being granted immunity under 18 U.S.C. 6002, petitioners nevertheless refused to answer questions posed by a federal grand jury in Fort Worth, Texas,[1]

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[1] The grand jury was investigating possible violations of Title I of the Gun Control Act of 1968 (18 U.S.C. 921, *et seq.*), Title II of the Gun Control Act of 1968 (26 U.S.C. 5861), Title XI of the Organized Crime Control Act of 1970 (18 U.S.C. 842, *et seq.*), the

and were held in civil contempt by the United States District Court for the Northern District of Texas.[2]

Petitioners were subpoenaed on June 13, 1972, to appear before the Fort Worth grand jury on June 19. When called, each man was asked questions relating to the purchase of firearms. All five petitioners refused to answer these questions; they based their refusals on various grounds, including the First, Fourth, Fifth, Sixth, and Ninth Amendments to the United States Constitution. The United States Attorney then filed applications seeking grants of immunity for petitioners pursuant to 18 U.S.C. 6002, accompanying each application with a letter signed by the Acting Assistant Attorney General in charge of the Internal Security Division stating that the United States Attorney was authorized to apply for an immunity order (I App. 114; II App. 379-380).[3]

The court held hearings with respect to the granting of immunity to petitioners.[4] After petitioners had moved for disclosure of electronic surveillance, the court ordered the government in the Reilly hearing to "affirm or deny whether there has been any electronic surveillance or wiretapping on any one of these wit-

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Foreign Agents Registration Act (22 U.S.C. 611, *et seq.*), and the general conspiracy statute (18 U.S.C. 371).

[2] Petitioners are currently free on bail pursuant to an order (Pet. App. 26a-27a) and opinion (Pet. App. 28a-30a) by Mr. Justice Douglas on September 12, 1972.

[3] "App." refers to the Appendix filed in the court of appeals.

[4] There was a separate hearing for petitioner Tierney (see I App.) and a later, consolidated hearing for petitioners Reilly, Morahan, Crawford and Laffey (hereinafter the Reilly hearing) (see II App.).

nesses or on any one of their lawyers" (II App. 453).[5] The government attorneys stated that a search of the government's records had disclosed no information that petitioners had been overheard by electronic surveillance or that any premises in which they had a proprietary interest had been the subject of electronic surveillance; with respect to petitioners' lawyers, the government attorneys had no knowledge of any electronic surveillance, but had not ordered a search of the records since they had not known of the lawyers until shortly before the hearings (II App. 455). The court then ordered a recess to allow such a search to be conducted (II App. 492).[6] When the hearing reconvened, a government attorney testified that a check with the appropriate governmental agencies had revealed no "electronic surveillance on the telephones of any of the [petitioners] or Counsel" and no "overhearing of these individuals" (II App. 523).

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[5] The quotation is from the Reilly hearing on June 23, 1972. During the Tierney hearing on June 20, 1972, the court inquired "whether or not the lawyers' telephone lines have been tapped" (I App. 243). The government attorney stated that until shortly before the hearing he had not even heard of petitioners' attorneys, that he had "no information that there was any electronic surveillance concerning the lawyers' lines," and that he firmly believed that "there was no type of wiretap at all on the attorney[s]" (I App. 243-244). When one of the attorneys from the Department of Justice stated that a search of the various federal investigative agencies disclosed no surveillance with respect to petitioner Tierney, the court inquired "How about the lawyers?" (I App. 253). The government attorney responded "The lawyers? I have never heard their names before until I heard them in Fort Worth" (*ibid.*).

[6] The court also instructed the government to determine whether any electronic surveillance had been conducted with respect to petitioners in the interim since the government had originally searched its records (II App. 521-522).

The court then entered orders granting petitioners immunity and requiring them to appear before the grand jury to answer questions and to testify (see, *e.g.*, I App. 11, II App. 308-309). Upon recall, however, petitioners again refused to testify. The government in each case applied for a "show cause" order as to why they should not be held in contempt. After a hearing, the court found petitioners in civil contempt; the court ordered each petitioner incarcerated until he agreed to testify or until the grand jury expired (Pet. App. 6a).[7] The subsequent appeals were heard on a 30-day expedited basis pursuant to 28 U.S.C. 1826(b).

On July 18, 1972, during preparation of the appeal, the government attorneys for the first time learned that one of petitioners' attorneys had been overheard on one occasion on June 17, 1972, during a surveillance conducted pursuant to court order (Pet. App. 13a). None of the petitioners nor the overheard attorney was the subject of this surveillance, and it did not involve any premises in which petitioners or the attorney had a proprietary interest. Nevertheless, pursuant to 18 U.S.C. 2518(8)(b), the government obtained from the court that had authorized the surveillance an order permitting disclosure of the application and order to the court of appeals; the government submitted those documents and the log of the overhearing to the court of appeals for its *in camera* review.[8]

The court of appeals affirmed (Pet. App. 1a-16a),

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[7] The term of the grand jury will expire in November 1973.

[8] This exhibit was lodged with the Clerk of this Court on the two occasions when these petitioners applied for bail, and we are herewith lodging it again.

rejecting petitioners' contention that they were possibly subject to prosecution in Great Britain and that the granting of use immunity was insufficient to compel them to testify over their assertion of their Fifth Amendment privilege against self-incrimination; and petitioners' contention that the Department of Justice failed to follow its guidelines in applying for immunity for petitioners. The court also rejected petitioners' claim that they were entitled to refuse to testify because of electronic surveillance conducted by the government. Although the overhearing of petitioners' attorney became known to the government attorneys only after the decision of the district court, the court of appeals examined the transcript of this overhearing *in camera* and concluded: "It contains nothing of evidentiary substance nor does it in anywise have to do with the right to counsel or the adequacy of representation by counsel. This incident does not afford a basis for the refusal of [petitioners] to testify before the grand jury" (Pet. App. 13a).

ARGUMENT

1. Unlike *Gelbard* v. *United States*, 408 U. S. 41, 47, this is not a case where "the Government has intercepted communications of the witnesses" and seeks testimony derived from the intercepted communications. Petitioners in this case were not the object of any electronic surveillance, they were not overheard during the surveillance of others, and the questions directed to them by the grand jury were not derived from any intercepted communications.[9]

[9] The overhearing in question took place after the subpoenas were issued, and the government attorneys did not even know of the

Yet petitioners claim they had "just cause" under 28 U.S.C. 1826(a), to refuse to comply with the court's order requiring them to answer the grand jury's inquiries. They base this claim on the Sixth Amendment because one of their attorneys had, on a single occasion, been overheard during a court-authorized surveillance directed at a third person without knowledge of the government attorneys in charge of this case. Petitioners argue further that they were entitled to disclosure of the transcript of this overhearing (which the government attorneys submitted to the court of appeals *in camera* when it was discovered) and to an evidentiary hearing. We submit that the court below correctly rejected petitioners' arguments in this regard.

The threshold question here is one of standing. In overhearing cases involving the Fourth Amendment, this Court has refused to adopt the approach advocated by petitioners. In *Alderman* v. *United States*, 394 U.S. 165, the Court held that when the government has illegally engaged in electronic surveillance and has either intercepted conversations of the defendant or conversations occurring on his premises (394 U.S. at 176)—neither of which occurred in the present cases—then the defendant has standing to claim that his conviction has been or would be procured through evidence obtained in violation of his Fourth Amendment rights. Once that preliminary determination of his standing has been made, then the "surveillance records as to which any petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge" (*id.* at 182). *Alderman* thus decided

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overhearing when petitioners came before the grand jury (Pet. App. 13a; II App. 523).

only that there must be disclosure for an adversary hearing if the defendant has the requisite standing to require this. See 394 U.S. at 185-186. In *Giordano* v. *United States,* 394 U.S. 310, 313, the Court explicitly pointed out that "disclosure and further proceedings" would not be required if the defendant did not have standing. As Mr. Justice Stewart observed in his concurring opinion in *Giordano,* 394 U.S. at 314: "We have nowhere indicated that this [threshold] determination cannot appropriately be made in *ex parte, in camera* proceedings." The Court repeated this in *Taglianetti* v. *United States,* 394 U.S. 316, 317, stating: "Nothing in *Alderman* v. *United States* * * * requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." In accordance with that interpretation of *Alderman,* the Court held that a trial judge had followed the proper procedure to determine standing when he examined the transcript of the intercepted communications *ex parte* and *in camera.* 394 U.S. at 317-318.

In the present case, petitioners assert no Fourth Amendment claim, since they were not overheard and no premises in which they have an interest were the subject of electronic surveillance. Thus they have no "unlimited license to rummage in the files of the Department of Justice" (*Alderman* v. *United States, supra,* 394 U.S. at 185) to examine the logs of interceptions, except to the extent that they have standing under the Sixth Amendment to do so. But it is well settled that a person has standing to raise a Sixth Amendment challenge to government surveillance of

another person only if the intercepted communication is within his personal attorney-client privilege. See *Black* v. *United States*, 385 U.S. 26; *Hoffa* v. *United States*, 385 U.S. 293, 304-309; *O'Brien* v. *United States*, 386 U.S. 345. If petitioners do not have standing, however, they are not entitled to disclosure of the intercepted communication. See, *e.g.*, *United States* v. *Seale*, 461 F. 2d 345, 364 (C.A. 7); *United States* v. *Zarzour*, 432 F. 2d 1, 4 (C.A. 5). As the court held in *United States* v. *Hoffa*, 436 F. 2d 1243, 1246 (C.A. 7), certiorari denied, 400 U.S. 1000, "defendants certainly have no standing to require production of logs of overhearings of conversations between their attorneys and other clients [or other persons] concerning matters totally unrelated to this case."

As with the determination of standing to raise Fourth Amendment claims, the proper procedure for determining standing in these circumstances is for the appropriate court to inspect the logs *in camera*. This is the uniform view of the courts of appeals. See, *e.g.*, *United States* v. *Seale*, *supra*; *United States* v. *Zarzour*, *supra*; *United States* v. *Hoffa*, *supra*, 436 F. 2d at 1246; *United States* v. *Kane*, 450 F. 2d 77, 82 (C.A. 5), certiorari denied, 405 U.S. 934; *Jones* v. *United States*, 443 F. 2d 822 (C.A. 9); *United States* v. *Battaglia*, 410 F. 2d 279 (C.A. 7), certiorari denied, 396 U.S. 848. The court below, therefore, correctly rejected petitioners' contention that the intercepted communication must be divulged to them and that an adversary hearing must be held to determine "the relevance of an attorney's wiretapped conversation to his representation of petitioners" (Pet. 11), since this would amount to requir-

ing disclosure in order to decide whether petitioners have standing to require disclosure. Having found that the log it properly reviewed *in camera* "contains nothing of evidentiary substance nor does it in anywise have to do with the right to counsel or the adequacy of representation by counsel" (Pet. App. 13a), the court below had a solid basis for holding that petitioners had no standing to examine the log or litigate its content.

Moreover, the issue in this case is only whether petitioners had any "just cause" to refuse to obey the district court's orders requiring them to answer grand jury questions, when there was no overhearing of their conversations with their lawyers, and the overhearing of one of their lawyers conversing with another person occurred as a result of a court-authorized surveillance of someone other than the attorney or petitioners. Whatever may be the preferred course in a criminal prosecution when conversations between a defendant and his counsel are overheard, the special nature of a grand jury proceeding makes an *ex parte* judicial determination particularly appropriate for determining at this preliminary juncture whether the attorney-client relationship is even involved. When, as here, it is determined that there is no such nexus, the questions of disclosure, taint, and "just cause," as well as the general issues petitioners discuss regarding the Sixth Amendment and the remedy for its violation, are simply not presented. In short, the court of appeals correctly decided the narrow issue involved in this case in accordance with the proper procedure, and further review is not warranted.

2. Petitioners also argue that their grants of use

immunity under 18 U.S.C. 6002-6003 inadequately safeguarded their Fifth Amendment privilege against self-incrimination, claiming that the Fifth Amendment protects against the threat of compelled incrimination under foreign law and that their grand jury testimony might have incriminated them under the laws of Great Britain. However, that preliminary contention about the proper scope of the privilege need not be considered because, as in *Zicarelli* v. *New Jersey Investigation Commission,* 406 U.S. 472, 480, the present petitioners were "never in real danger of being compelled to disclose information that might incriminate [them] under foreign law." As the Court held in *Zicarelli, supra,* 406 U.S. at 478, "[i]t is well established that the privilege protects against real dangers, not remote and speculative possibilities." In *Zicarelli,* the nature of the questioning showed there was no real risk of incrimination under foreign law. In the present case, we agree with the court of appeals (Pet. App. 8a-11a) that there is a different but equally conclusive reason to find no significant danger of incrimination. The questions asked here were in the secrecy of grand jury proceedings and, if petitioners had testified, there would have been no substantial risk of foreign prosecution on the basis of their answers. Petitioners hypothesize a number of circumstances where grand jury testimony might be disclosed, including the prosecution of a witness for perjury (Pet. 22, n. 28). But all of these suggested possibilities reflect mere speculation not approaching the "real and appreciable" dangers—as distinguished from "trifling" or "remote possibilities out of the ordinary course of law"—that must

underlie a valid claim of the privilege (even assuming *arguendo* it would apply). See *Marchetti* v. *United States,* 390 U.S. 39, 48, 53; *Grosso* v. *United States,* 390 U.S. 62, 66. As the court below explained, the same court that orders the testimony before its grand jury has ample power to protect the secrecy of the testimony given (Pet. App. 9a). Thus, there is no reason to believe that petitioners' testimony, given in secret before the grand jury, would ever be made public, or that it would be made available to a foreign government to use in prosecuting them. See *In re Parker,* 411 F. 2d 1067, 1969-1070 (C.A. 10), vacated as moot *sub nom. Parker* v. *United States,* 397 U.S. 96.

In addition, the grand jury questions set forth in the Petition, at pp. 17-19, n. 25, are not inquiries concerning foreign involvements and, for this reason as well, do not pose "a substantial risk of incrimination under foreign law." *Zicarelli* v. *New Jersey Investigation Commission, supra,* 406 U.S. at 479-480; see also *id.* at 479, n. 17. As in *Zicarelli,* 406 U.S. at 478-479, petitioners have quoted only newspaper articles to demonstrate their fear of foreign prosecution (Pet. 16-17, n. 24). This Court's conclusion in *Zicarelli,* 406 U.S. at 481, that the constitutional question was not presented is fully applicable here, especially since the questions propounded were in the secrecy of grand jury proceedings.

3. There is nothing to petitioners' contention that the government failed to follow its internal procedures with respect to applications for immunity. The Department of Justice policy, quoted at Pet. 23,[10] was

[10] Department of Justice, *A Practical Handbook of Federal Grand Jury Procedure,* § 4:3:2, p. 47 (1968 ed.).

fully adhered to: each application for immunity was accompanied by a letter of authorization to the United States Attorney, signed by the Acting Assistant Attorney General in charge of the Internal Security Division indicating the approval required by statute, 18 U.S.C. 6003 (I App. 114; II App. 379-380).[11] While we agree with the court of appeals that the guidelines relating to internal approval of the submission of immunity requests "are not directed to the procedural or substantive rights of prospective witnesses" (Pet. App. 14a), these guidelines were actually followed.[12] The Assistant Attorney General's letter states, as required by the statute, that authorization is given "upon consideration of your [the United States Attorney's] request" since the testimony is "necessary and in the public interest" and further notes that the Assistant Attorney General in charge of the Criminal Division also concurred in the authorization (I App. 114).

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[11] As the court below observed, "The Acting Assistant Attorney General in charge of the Internal Security Division of the Department of Justice authorized the seeking of the grants of use immunity by the United States Attorney and recited that the testimony sought was necessary and in the public interest. This was in compliance with the statutory requirements" (Pet. App. 14a). The statute requires approval by the Attorney General or a designated Assistant Attorney General, and the official who certified his approval has been so designated. See 28 C.F.R. 0.175 (December 23, 1970); See also *In re Horn*, 458 F.2d 468, 473 (C.A. 3).

[12] Petitioners' allegation (Pet. 24) that government counsel professed ignorance of the guidelines, in effect admitting noncompliance, is not accurate. The Assistant United States Attorney, Mr. McCown, said only that a letter from the Deputy Attorney General to the Chairman of the House Judiciary Committee explaining the policy (Pet. App. 34a-41a) had "not been circulated in our office" (I App. 110); he nowhere indicated that the policies expressed in that letter had not been followed.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-623

KENNETH TIERNEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

MATHIAS REILLY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY

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APPENDIX:

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B—Affidavit of John H. Davitt, Acting Deputy Assistant Attorney-General in the Internal Security Division of the Department of Justice, filed in United States v. Purcell, 72 Cr. 1077 (S.D.N.Y.) 16a

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-623

KENNETH TIERNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

MATHIAS REILLY, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY

Petitioners seek to bring to the Court's attention matter not available at the time of the filing of the petition for

writ of certiorari on October 20, 1972, that bears upon the appropriate disposition of this application for review,* and, further, to respond briefly to statements by the government in its Brief in Opposition filed December 11, 1972.

1. The Decision of the United States District Court for the District of Connecticut in *In re Karen Cardassi*, Civ. No. 15,346, Creates a Conflict With The Decision Below Which Further Warrants Plenary Review in the Instant Case.

Since the filing of the petition, the United States District Court for the District of Connecticut, in a thirteen (13) page decision issued on December 1, 1972, has held that, pursuant to the Fifth Amendment privilege against self-incrimination, a witness before a federal grand jury has the right to decline to answer questions that might tend to incriminate him under the laws of a foreign country, notwithstanding a grant of use immunity under 18 U.S.C. §§6002-3. *In re Karen Cardassi*, Civ. No. 15,346 (D. Conn., 1972). That ruling is directly at odds with the decision below, thus creating a conflict in lower court decisions which further warrants the granting of the petition in the instant case.** Indeed, in rejecting the argument urged here by the government that the "secrecy" of the grand jury is an adequate protection for a wit-

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* See Rule 24(5) of the Rules of this Court.

** The full opinion is *Cardassi* is reproduced in Appendix A, *infra*, pp. 1a-15a.

ness,* Judge Newman expressly declined to follow the reasoning of the Fifth Circuit in the instant case:

> The witness claims the right to invoke the self-incrimination privilege because of her fear that, despite domestic use immunity, her testimony may be used against her in a foreign prosecution. The Government first answers that such fears are unreasonable in light of the strict judicial controls against disclosure of grand jury minutes provided by Fed. R. Crim. P. 6(e). Since the minutes cannot be disclosed without court approval, the argument runs, the court can insure that no disclosure of her answers will be permitted in circumstances where the answers might end up in the hands of foreign prosecuting authorities.
>
> With deference, this Court declines to follow the two courts of appeals which have found this argument persuasive. *In re Tierney,* 465 F. 2d 806, 811-12 (5th Cir., 1972); *In re Parker,* 411 F. 2d 1067, 1069-70 (10th Cir., 1969), *vacated and remanded for dismissal as being moot, Parker* v. *United States,* 397 U. S. 96 (1970). The argument rests on the assumption that all law enforcement officials with access to grand jury minutes can be relied upon to abide by the disclosure requirement of Rule 6(e). While there is no reason to believe that any enforcement officials presently involved in this grand jury proceeding would not honor the rule, the constitutional protection of the witness must rest on more than faith. If in fact a law enforcement official wanted to make the witness's answers known to foreign prosecuting officials, it is unlikely that he would apply to this Court for disclosure of the grand jury minutes. He

* Brief of the United States, p. 11.

would simply send the transcript. It may well be that such conduct would render the official subject to the disciplinary powers of this Court if the conduct and the identity of the person responsible ever became known, but such an after-the-fact sanction would provide no protection for the witness.

The inability of American courts to use Rule 6(e) as an effective protection for the witness against foreign use of her compelled testimony is highlighted by comparison with the ability the courts do have to enforce within this country the derivative use prohibition of 18 U.S.C. §6002. If a federal or state prosecuting official attempts to use evidence obtained directly or derivatively from a witness compelled to answer after receiving use immunity, the courts of this country have power to make sure that such evidence is excluded, or that any conviction thereby obtained is set aside. See *Kastigar* v. *United States*, 406 U. S. 441 (1972); see also *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964). The prospect feared by the witness in such circumstances is within the ultimate control of federal and state trial courts, with direct and collateral review available culminating in the Supreme Court. Such control can be relied upon to provide "very substantial protection" against use of compelled testimony against a witness in domestic courts. *Kastigar* v. *United States*, *supra*, 406 U. S. at 461; but see *id.* at 469 (dissenting opinion of Justice Marshall). The existtence of this judicial control was what persuaded the Court in *Kastigar* that the self-incrimination privilege could be displaced by a grant of use immunity. "A person accorded this immunity under

> 18 U.S.C. §6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Id.* at 460. Rule 6(e) provides no similar protection, yet it is the sole safeguard the Government can offer a witness who fears his compelled testimony may be used against him in foreign courts where the domestic judicial ban on use and derivative use of compelled testimony is unenforceable.
>
> *In re Cardassi, infra* at 3a-6a (footnote omitted).

Proceeding then to the "ultimate constitutional question . . . whether the self-incrimination privilege provides protection for the witness, despite use immunity, once it has been determined that her fear of foreign prosecution is reasonable," *infra,* at 10a the court, relying upon this Court's approval in *Murphy* v. *Waterfront Commissioner,* 378 U. S. 52 (1964) of *United States* v. *McRae,* L. R. 3 Ch. App. 79 (1867), answered in the affirmative: *"Murphy's* acceptance of the English rule, as stated in *United States of America* v. *McRae,* L. R. 3 Ch. App. 79 (1867), clearly makes the privilege a protection against foreign prosecution. The Court discussed at length the Court of Chancery Appeal decision in *McRae,* where the privilege was successfully claimed in an English court to guard against an American prosecution." *Infra* at 10a. In resolving the "ultimate constitutional question" in favor of the witness, Judge Newman carefully considered and rejected "the proposition that the Bill of Rights does not provide an American citizen with any protection against the actions of foreign governments." *Infra* at 11a. The instant case thus affords the Court an ap-

propriate opportunity to resolve a conflict of lower court decisions on a constitutional question of substantial importance.

2. The Electronic Surveillance of Petitioners' Counsel.

The ultimate issue to be solved in this case is whether the proceedings before the grand jury or the courts below were tainted by electronic surveillance of an attorney conducted by the federal government during the period the attorney was engaged in the representation of petitioners.* At various points in its brief, the government alleges that its attorneys had no knowledge, while this case was before the district court, of the admitted electronic surveillance of petitioners' counsel.** Both

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* In a remarkable turn of logic, the government states as a fact that "the questions directed to [petitioner] by the grand jury were not derived from any intercepted communications," thereby taking as its premise the very question that is to be resolved.

** In the Court of Appeals and in this Court, the government has maintained that petitioners' counsel was overheard "on one occasion." Matter arising since the filing of the petition casts doubt on the accuracy of this statement. Questions asked petitioners included express reference to one Patrick Purcell. See Petition, p. 17, n. 25. Subsequent to the district court proceedings, Purcell was indicted in the Southern District of New York for alleged federal firearms violations. *United States* v. *Purcell*, 72 Cr. 1077 (S. D. N. Y.). Purcell is represented by Frank Durkan, one of petitioners' counsel. In response to a pre-trial motion for disclosure of electronic surveillance of Purcell and Durkan, an affidavit dated November 10, 1972, was filed by John H. Davitt, Acting Deputy Assistant Attorney General in the Internal Security Division of the Department of Justice, in which Mr. Davitt states

(Footnote continued on following page)

logic and the prior decisions of this Court, however, make clear that such an allegation is of no consequence.

In *Black* v. *United States,* 385 U. S. 26 (1966), while that case was before this Court, the government admitted electronic surveillance of a conversation between a defendant and his attorney. Notwithstanding the same allegation made here, that the government attorneys were unaware of the fact of surveillance at the time the case was before the district court, this Court vacated the judgment of conviction and remanded for a new trial. Justices Harlan and Stewart, while disagreeing with the majority as to the appropriate disposition, entertained no doubt "that [Black] is entitled to a full-scale development of the facts." 385 U. S. at 31. They would have remanded to the district court so that "the facts on this issue [could be] resolved and their legal effect assessed." *Id.* Again, in *O'Brien* v. *United States,* 386 U. S. 345 (1967), this Court vacated a judgment of conviction and remanded for a new trial when the government admitted electronic surveillance of a conversation between a defendant and his attorney, despite the government's claim

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(Footnote continued from preceding page)

that Mr. Durkan was overheard by federal electronic surveillance on *two* occasions before September 14, 1972. (The Davitt affidavit is reproduced in Appendix B, *infra,* pp. 16a-18a). We do not know the precise dates of this surveillance, nor whether either is the surveillance the government has already admitted herein. Because, however, the surveillance acknowleged in the instant case occurred, by the government's own admission, in connection with a separate aspect of the same investigation involved in the Forth Worth proceedings, see Petition, p. 6, there is now increased likelihood that the government has conducted electronic surveillance of counsel related to the representation of petitioners.

that the trial attorneys were unaware that surveillance had been conducted.*

The *Black-O'Brien* rule that government attorney ignorance of electronic surveillance is of no moment is eminently correct. The question is not whether such an attorney was aware of surveillance but whether that surveillance affected the course of his representation of the government. Because investigatory agents frequently conceal from government attorneys that their source of information was electronic surveillance, even while they are providing the attorneys with information relevant to a particular case,** it is entirely possible that electronic surveillance would have tainted grand jury or other proceedings without the knowledge of government counsel.

The government argues and cites several cases for the proposition that the Sixth Amendment rights of petitioners were not violated if the overheard conversation was unrelated to counsel's representation of petitioners. We agree; however, that is not the issue. The question is of the nature of the procedure to be employed in determining whether or not the surveilled conversation pertained in any way to petitioners' legal representation. The government's effort to transfer the procedure for determining standing in Fourth Amendment cases to those involving Sixth Amendment issues is erroneous, ignoring as it does that standing under the Sixth Amend-

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* Again Justices Harlan and Stewart would have remanded "for a full hearing as to the circumstances and effects of these activities." 386 U. S. at 347.

** See e.g., the November 30, 1966 Memorandum of the United States filed in this Court in *Schipani* v. *United States,* 385 U. S. 376 (1966).

ment (unlike standing under the Fourth) depends upon the relevance of the contents of the surveilled conversation to the client's case. As Mr. Justice Douglas noted in granting a stay in *Russo* v. *Byrne,* 93 S. Ct. 21, 22 (1972):

> The Court of Appeals, as I read its opinion, ruled that the defendants—i.e., petitioners who make this application—have no "standing" to raise the question. If, however, the interception were "relevant" to the trial, it would seem they would have "standing."
>
> Therefore, it would seem to follow from the reasoning of the Court of Appeals that whether or not there was "standing" would turn on the merits. The case, viewed in that posture, would seem to require an adversary hearing on the issue of relevancy. We held, in Alderman v. United States, 394 U. S. 165, 182, 89 S. Ct. 961, 971, 22 L. Ed. 2d 176 (1969), that the issue of relevancy should not be resolved *in camera,* but in an adversary proceeding. Alderman would be greatly undercut if the issue of relevance could be resolved *in camera,* and if the trial court ruled against the defendants on the merits and then determined they had no "standing" to complain.

The issue of interlocutory review which was involved in *Russo, supra,* is not involved here. The important question of the application of *Alderman* v. *United States, supra,* to electronic surveillance of counsel is thus squarely presented.

3. Government Failure to Comply With Department of Justice Guidelines.

The government's allegation that Department of Justice guidelines regarding immunity applications (Pet. App. E, pp. 36a-39a) were complied with is both unsubstantiated and irrelevant. The issue in the district court was not whether the Assistant Attorney General authorized the applications here under 18 U.S.C. §6003(b), but whether he did so after the procedures required by the guidelines were complied with. The government does not address that question.

Secondly, the question is whether petitioners had "just cause" to refuse to testify. If the government is required to adhere to its own guidelines but a witness is denied the right in the district court, as were petitioners, to determine non-compliance therewith, then *at the time of his refusal to testify* the witness could properly assume non-compliance and therefore had just cause. The government's subsequently establishing compliance does not alter the fact that, at the time the witness refused to testify, it had failed to do so. See *Bacon* v. *United States,* 466 F. 2d 1196, 1198 (9 Cir., 1972) (on remand from this Court. *Bacon* v. *United States,* 408 U. S. 915 (1972)).*

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* We fail to understand why the government waits until a case reaches this Court to attempt to create a favorable factual record. If the government wanted to assert compliance with its own guidelines, there is no reason why it could not have done so in the district court. *Cf. United States* v. *Egan,* 408 U. S. 41 (1972), where the government waited to deny electronic surveillance of the witness until it filed its petition for certiorari in that case.

CONCLUSION

For the aforegoing reasons and for the reasons set forth in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

December, 1972

[APPENDICIES FOLLOW]

APPENDIX A

Opinion in *In re: Karen Cardassi*, Civ. No. 15,346 (D. Conn., Dec. 1, 1972)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 15,346

In Re

KAREN CARDASSI

This is an application by the Government for an order to compel a grand jury witness to answer questions after the witness has been accorded use immunity pursuant to 18 U.S.C. §6003. The issue is whether and in what circumstances a witness given use immunity by a federal court may invoke the self-incrimination privilege of the Fifth Amendment as a safeguard against foreign prosecution.

The witness appeared pursuant to subpoena before a session of the federal grand jury for the District of Connecticut at New Haven on September 25, 1972. She was asked the following four questions:

1. Where in the last fifteen months have you traveled with Harry Maiden?

Appendix A

2. On July 6, 1972 were you in an apartment in West Haven with Harry Maiden, Edward Andrew Shea, Clifford B. Warsaw, and Roland Febles?

3. On the evening of July 6, I believe it was, in the apartment in question a large amount of marijuana was found and a large amount of marijuana was recovered in another apartment. Would you tell us please, if you know, where the marijuana came from?

4. Have you traveled overseas with Harry Maiden or in any foreign country?

The witness was permitted to consult with her attorney outside the grand jury room after each question, and responded to each question by invoking her privilege against self-incrimination. The Government immediately brought the witness before this Court to secure an immunity order. Following a brief hearing at which the witness, through counsel, presented certain procedural objections to the grant of immunity, this Court entered an order granting the witness use immunity.[1] The witness

[1] The witness had objected to the immunity order on the ground that the Government had failed to establish compliance with the internal administrative steps which the Department of Justice requires be followed by the United States Attorney applying for the immunity order. These steps are set forth in a letter from Attorney General Kleindienst to Chairman Celler of the House Judiciary Committee, dated November 30, 1971. *Hearings on H.R.* 2589, 8829, *and* 10689 *Before Subcommittee No. 5 of the House Committee on the Judiciary*, 92d Cong., 1st Sess. (Nov. 10, 1971), pp. 68-71. This Court rejected this challenge, believing that §6003

(Footnote continued on following page)

returned to the grand jury room and advised the grand jury that she would continue to refuse to answer the questions previously put to her, relying on her self-incrimination privilege. The Government then brought the witness back to this Court to seek an order compelling her to answer the questions.[2]

I

The witness claims the right to invoke the self-incrimination privilege because of her fear that, despite domestic use immunity, her testimony may be used against her in a foreign prosecution. The Government first answers that such fears are unreasonable in light of the strict ju-

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(Footnote continued from preceding page)

sets forth the only procedural requirements that must be met before an immunity order may be entered. See *In re Tierney*, 465 F. 2d 806, 813 (5th Cir. 1972). The Court had previously expressed to the Government some doubts as to whether an application for an immunity order could be acted upon before the witness has appeared and invoked her privilege, since this approach, though authorized by the statute, appeared to raise a substantial question of whether there existed a case or controversy within the meaning of Article III. The Government, however, declined to press the point and elected to seek the immunity order only after the witness had testified and invoked her privilege.

[2] The immunity order entered at the witness's first court appearance not only granted her use immunity but also directed her to answer the grand jury's questions. However, in considering the Government's request for the immunity order, the Court dealt only with the Government's entitlement to grant the witness use immunity, not with the availability of the self-incrimination privilege to the witness, notwithstanding use immunity. The latter issue is now before the Court.

dicial controls against disclosure of grand jury minutes provided by Fed. R. Crim. P. 6(e).[3] Since the minutes cannot be disclosed without court approval, the argument runs, the court can insure that no disclosure of her answers will be permitted in circumstances where the answers might end up in the hands of foreign prosecuting authorities.

With deference, this Court declines to follow the two courts of appeals which have found this argument persuasive. *In re Tierney*, 465 F. 2d 806, 811-12 (5th Cir. 1972); *In re Parker*, 411 F. 2d 1067, 1069-70 (10th Cir. 1969), *vacated and remanded for dismissal as being moot*,

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[3] Rule 6. The Grand Jury

• • •

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Parker v. *United States*, 397 U. S. 96 (1970). The argument rests on the assumption that all law enforcement officials with access to grand jury minutes can be relied upon to abide by the disclosure requirements of Rule 6(e). While there is no reason to believe that any enforcement officials presently involved in this grand jury proceeding would not honor the rule, the constitutional protection of the witness must rest on more than faith. If in fact a law enforcement official wanted to make the witness's answers known to foreign prosecuting officials, it is unlikely that he would apply to this Court for disclosure of the grand jury minutes. He would simply send the transcript. It may well be that such conduct would render the official subject to the disciplinary powers of this Court if the conduct and the identity of the person responsible ever became known, but such an after-the-fact sanction would provide no protection for the witness.

The inability of American courts to use Rule 6(e) as an effective protection for this witness against foreign use of her compelled testimony is highlighted by comparison with the ability the courts do have to enforce within this country the derivative use prohibition of 18 U.S.C. §6002. If a federal or state prosecuting official attempts to use evidence obtained directly or derivatively from a witness compelled to answer after receiving use immunity, the courts of this country have power to make sure that such evidence is excluded, or that any conviction thereby obtained is set aside. *See Kastigar* v. *United States*, 406 U. S. 441 (1972); *see also Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964). The prospect feared by the witness in such circumstances is within the ultimate control of federal and state trial courts, with

direct and collateral review available culminating in the Supreme Court. Such control can be relied upon to provide "very substantial protection" against use of compelled testimony against a witness in domestic courts. *Kastigar* v. *United States, supra,* 406 U. S. at 461; *but see id.* at 469 (dissenting opinion of Justice Marshall). The existence of this judicial control was what persuaded the Court in *Kastigar* that the self-incrimination privilege could be displaced by a grant of use immunity. "A person accorded this immunity under 18 U.S.C. §6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Id.* at 460. Rule 6(e) provides no similar protection, yet it is the sole safeguard the Government can offer a witness who fears his compelled testimony may be used against him in foreign courts where the domestic judicial ban on use and derivative use of compelled testimony is unenforceable.

II

Thus there must be faced in this proceeding the issue, specifically left open by the Supreme Court in *Zicarelli* v. *New Jersey State Commission of Investigation,* 406 U. S. 472 (1972), whether a use immunity statute displaces the self-incrimination privilege when the witness alleges fear of foreign prosecution. While the Court noted probable jurisdiction in *Zicarelli* to resolve this issue, 401 U. S. 933, 934 (1971), decision was deemed unnecessary because the questions there asked of the witness were not viewed by th Court as calling for answers that gave the witness a reasonable basis for fearing foreign prosecution. 406 U. S. at 478-81.

The preliminary question here, therefore, is whether this witness had a reasonable basis for fearing foreign prosecution. Unfortunately, analysis of *Zicarelli* creates some doubt as to what test is to be applied in making this determination. The Court identified only one question that might have justified Zicarelli's fear of foreign prosecution: "In what geographical area do you have Cosa Nostra responsibilities?" *Id.* at 480. The Court rejected the witness's concern on two grounds: first, that the context of the question showed it referred to geographical areas in New Jersey, and, second, that even if the witness had international Cosa Nostra responsibilities, he could have "qualif[ied] his answer by confining it to domestic responsibilities in order to avoid incrimination under foreign law." *Id.* at 481. This second approach might suggest that a question will be analyzed to determine whether the answer directly relates to foreign involvement, rather than whether it might provide "a link in the chain of evidence" needed for a foreign prosecution. *See Blau* v. *United States*, 340 U. S. 159, 161 (1950).

Primarily, however, the Court emphasized that the questions must be considered in the "context" or "setting" in which they are asked. 406 U. S. at 480; *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951). It was the context of the 100 questions asked Zicarelli that persuaded the Court that there was no reasonable fear of foreign prosecution. Moreover, in rejecting the significance of some of these questions, the Court explicitly used the "link in the chain" test of *Blau*. 406 U. S. at 479, n. 16. Thus foreign prosecution can be reasonably apprehended if the context of the questions establishes that the answers they seek might be incriminating under foreign law.

Appendix A

The four questions asked here do not by themselves either completely establish nor negate a context in which the answers might be incriminating under foreign law. But the questions were acknowledged by the prosecutor to be only a sample of what was to come.[4] Moreover, the prosecutor candidly stated that at least one of the contexts of the questions he had asked and others he expected to ask concerned dealings in marijuana in Mexico. As he stated at the hearing on this motion, "[I]t is really what happened down in Mexico that we are primarily concerned about. . ." Tr. 55. "Your Honor, I think what [defense counsel] is trying to establish is that what we have in mind here is an investigation into marijuana and other matters which involve Mexico. That is true. There is no question about it. If that is what he is hoping to establish, I am happy to say that on the record." Tr. 36. The context was further elaborated by the pendency of an indictment in this District charging Harry Maiden and others inquired about in question 2 with possession of 500 pounds of marijuana. Finally, the witness introduced a newspaper article describing the pending charges as being related to an investigation of marijuana smuggling from Mexico. While the prosecutor disputed some allegations of the article, there was no dispute that the incident being probed did concern marijuana smuggling from Mexico.

Against this context, questions 1, 3, and 4 plainly call for answers that might reasonably be feared to be in-

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[4] "Your Honor, I should point out that the questions that were asked of the witness yesterday were really designed only to be representative questions, to simply get the matter in before a hearing, and it was by no means all the questions we intend to ask her." Tr. 56-57.

criminating under the laws of Mexico, which penalize exporting and trafficking in marijuana and aiding and abetting such activities.[5] Question 2, viewed in isolation, may relate to conduct that might violate United States and Connecticut laws, rather than the laws of Mexico, since the apartment asked about is located in West Haven, Connecticut. However, if the witness has a reasonable basis for fearing foreign prosecution for smuggling narcotics from Mexico to Connecticut, then even a disclosure concerning her presence at an apartment with those accused of smuggling narcotics can certainly provide a link in the chain of evidence needed for such a foreign prosecution.[6] In a different context, the witness might have no reasonable basis for fearing prosecution by responding to question 2. In this context, her fear is entirely reasonable.[7]

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[5] Codigo Penal Mexicano, Arts. 195, 197 (1967 amendments).

[6] As Cockburn, C.J., observed, in a passage frequently cited in Supreme Court decisions, the court must determine "from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend danger." But "if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question." *Queen* v. *Boyes*, 1 B. & S. 311, 329-330, 121 Eng. Rep. 730, 738 (1861).

[7] As additional basis for the witness's apprehension, her counsel points to a reference in the newspaper article to some interest in the case on the part of Mexican authorities. While the Government disputes the truthfulness of this reference, it nonetheless does provide additional basis, even if disputed, for the witness to fear foreign prosecution.

Appendix A

III

The ultimate constitutional question is whether the self-incrimination privilege provides protection for the witness, despite use immunity, once it has been determined that her fear of foreign prosecution is reasonable. The question has not been answered in this Circuit, though the Tenth Circuit has, as an alternate holding, ruled against the claim. *In re Parker, supra.*

While *Zicarelli* did not answer the question, the Supreme Court's prior decision in *Murphy* provides sufficient guidance for a determination that the privilege can be invoked in these circumstances. The Court there rejected the two sovereignties rule of *United States* v. *Murdock,* 284 U. S. 141 (1931), pointed out the historical error underlying the *Murdock* rule, and concluded by accepting the construction of the privilege given by the English courts and by the early Supreme Court decisions of *United States* v. *Saline Bank of Virginia,* 1 Pet. 100 (1828), and *Ballmann* v. *Fagin,* 200 U. S. 186 (1906). While *Saline Bank and Ballmann* were both concerned with a claim of the privilege in a federal proceeding to guard against state prosecution, *Murphy's* acceptance of the English rule, as stated in *United States of America* v. *McRae,* L. R., 3 Ch. App. 79 (1867), clearly makes the privilege a protection against foreign prosecution. The Court discussed at length the Court of Chancery Appeal decision in *McRae,* where the privilege was successfully claimed in an English court to guard against an American prosecution. *See, generally,* Grant, "Federalism and Self-Incrimination" 5 U. C. L. A. L. R. 1 (1958).

Nothing in Zicarelli impairs the *Murphy* rule that the privilege can be asserted in the forum of one sovereign

to guard against prosecution in the courts of another sovereign. *Zicarelli* simply applies to this rule the traditional limitation that the fear of foreign prosecution must be "real" and not a "remote and speculative" possibility. 406 U. S. at 478. That test is met in this case. *Zicarelli* does not appear to require any indication that a foreign prosecution is imminent.

The Government contends that *Murphy* should not be understood as adopting the English rule concerning the scope of the privilege because of earlier cases which they cite for the proposition that the Bill of Rights does not provide an American citizen with any protection against the actions of foreign governments. They rely on such cases as *Neely* v. *Henkel,* 180 U. S. 109 (1901), and *Gallina* v. *Fraser,* 177 F. Supp. 856 (D. Conn. 1959), *aff'd,* 278 F. 2d 77 (2d Cir. 1960), *cert. denied,* 364 U. S. 851 (1960). These are extradition cases. They raise the issue of whether a federal court, in the exercise of its habeas corpus jurisdiction, may interfere with a decision of the Executive Branch to remit a citizen to a foreign government on the grounds that a protection of the Bill of Rights will not be available to the citizen in the foreign prosecution. The cases are unanimous that American courts should decline to interfere in this manner. The reason, as set forth by the Second Circuit in *Gallina,* is that "the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government." 278 F. 2d at 79.

It is one thing for a federal court to decline to interfere with the treaty obligation of the Executive Branch to surrender a prisoner to a foreign government, once the

court has determined that the prerequisites to extradition have been met. It is entirely different for a federal court to use its judicial power to compel a witness, under threat of incarceration for contempt, to provide testimony that may well lead to a successful foreign prosecution. There are two vital differences between these two situations. First, in the extradition cases, the significant power of remitting the citizen is being exercised by the Executive Branch; the Judicial Branch is simply declining to interfere in an area of traditional executive discretion. In cases like the instant one, however, where the witness asserts the privilege in an American court, the proper use of judicial rather than executive power is at issue.[8] Secondly, the extradition cases are concerned with possible Fifth Amendment violations—both the compulsion of the testimony and its use at trial—which might be committed by the foreign prosecuting government; there is no authority, however, for testing that government's actions against the Fifth Amendment. Precisely the opposite is true where the compulsion of testimony or its use at trial is attempted by an instrumentality of our government, for its actions are obviously limited by the Fifth Amendment.

The Fifth Amendment may well be no restraint on governmental action to extradite a person who claims that

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[8] In this connection, it is worth noting the distinction made by Justice Jackson in the Japanese-American relocation case, *Korematsu* v. *United States*, 323 U. S. 214, 248 (1944):

> I do not suggest that the court should have attempted to interefere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution.

his testimony will be compelled and used against him in a foreign court.[9] But the Amendment must be reckoned with when a person in an American court claims that his testimony is being judicially compelled here and may well be used in a foreign court. In this situation, the issue is not the availability of the privilege but its proper scope, *i.e.*, whether the reasonably feared prospect of foreign use of testimony can be a basis for resisting its compulsion by an American court.[10] Since *Murphy* con-

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[9] Though early cases had stated that Constitutional protections are totally inapplicable to crimes committed outside United States jurisdiction, *e.g.*, *Neely* v. *Henkel, supra,* 180 U. S. at 122, there is at least a suggestion in more recent cases that the decision to turn an American citizen over to foreign prosecution is not to be made without some regard to constitutional limitations, though those limitations may well not be exceeded in a particular case. For example, in declining to interfere with the decision to turn a soldier over to the jurisdiction of Japanese courts pursuant to a provision of an Administrative Agreement, the Supreme Court observed: "We find no constitutional or statutory barrier to the provision as applied here. *In the absence of such encroachments,* the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches." *Wilson* v. *Girard,* 354 U. S. 524, 530 (1957) (emphasis added).

The Second Circuit has also expressed some doubt about the general proposition that procedures of the foreign jurisdiction need never be tested against constitutional limitations: "Nevertheless, we confess to some disquiet at this result. We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above. This is not such a case." *Gallina* v. *Fraser, supra,* 278 F. 2d at 79.

[10] Similarly, the scope of the privilege would have to be determined when a person in an American court claims that testimony to be used here has been compelled abroad. The answer might well turn on the precise circumstances of the alleged compulsion.

strued the privilege to have the same scope under our Constitution as it has in England, where it can be claimed to preclude foreign use of compelled testimony, the privilege can be claimed in this case at the point when the testimony is sought to be judicially compelled.

Finally, the Government suggests that if the privilege has sufficient scope to enable a witness given use immunity to decline answering questions for fear of foreign prosecution, law enforcement efforts, especially those concerned with the narcotics laws, will be frustrated. Of course, a constitutional privilege does not disappear, nor even lose its normal vitality, simply because its use may hinder law enforcement activities. That is a consequence of nearly all the protections of the Bill of Rights, and a consequence that was originally and ever since deemed justified by the need to protect individual rights. Moreover, it is largely up to the prosecuting authorities to shape the context in which a witness's claim of privilege will be assessed. They can decide not to ask questions which establish a context that gives a reasonable basis for a witness's fear of foreign prosecution. For example, the prosecutor here informed the Court that, wholly apart from the Mexican episode, he was interested in asking the witness about the identity of an individual who was involved in a sale of narcotics in the District of Connecticut. There appears to be no reason why this line of inquiry cannot, with care, be pursued in a context that creates no reasonable fear that the answers might be incriminating under foreign law. Questions concerning most violations of domestic law can be framed to avoid creating such a context. But that was not done with respect to the four questions currently at issue.

Accordingly, the Government's motion for an order compelling the witness to answer the four questions put to her is denied.

Dated at New Haven, Connecticut, this 1st day of December, 1972.

JON O. NEWMAN
United States District Judge

APPENDIX B

Affidavit of John H. Davitt, Acting Deputy Assistant Attorney General in the Internal Security Division of the Department of Justice, Filed in *United States* v. *Purcell*, 72 Cr. 1077 (S.D.N.Y.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

PATRICK PURCELL,

Defendant.

AFFIDAVIT

72 Cr. 1077

JOHN H. DAVITT, being duly sworn, deposes and says:

1. That he is an Acting Deputy Assistant Attorney General in the Internal Security Division of the Department of Justice.

2. That pursuant to an order of this Court he caused an inquiry to be made of the appropriate agencies of the Federal Government to determine if there has been any electronic surveillance of the conversations of Patrick Purcell or any electronic surveillance of conversations

from the period December 1, 1971 to date to which Frank Durkan, counsel for Patrick Purcell, was a party. The Federal agencies to whom this inquiry was directed are:

a. Federal Bureau of Investigation.

b. Bureau of Narcotics and Dangerous Drugs

c. United States Secret Service

d. Internal Revenue Service

e. Bureau of Customs

f. Bureau of Alcohol, Tobacco and Firearms

g. United States Postal Service

3. That these agencies were selected as appropriate for inquiry because at the time the requests were made they were the only agencies that had requested authority to conduct and had conducted electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90-351. All national security electronic surveillances authorized by the Attorney General have been conducted solely by, and all records of such surveillances have been maintained by the Federal Bureau of Investigation.

4. That based on the results of such inquiry the deponent hereby states that there has been no electronic surveillances occurring on premises known to have been owned, leased or licensed by Patrick Purcell.

The deponent further states that there was no electronic surveillance directed against Patrick Purcell, *per se*, and there have been no overhearings by electronic surveillance, at any location, of conversations to which Patrick Purcell was a party.

Appendix B

The deponent also states that there have been no overhearings by electronic surveillance of conversations related to this case intercepted at the defendant's home, 57 South Magnolia Avenue, Pearl River, New York, ((914) PE 5-2996), at his place of employment, Manhattan-Bronx Surface Transportation Operating Authority, 605 West 132nd Street, New York, New York, ((212) AU 6-2000) and at his attorney's office, O'Dwyer and Bernstein, 50 Broad Street, New York, New York, ((212) BO 9-3939).

5. That on two occasions Frank Durkan, counsel for Patrick Purcell, was overheard on an electronic surveillance which was specifically authorized by a Federal Court pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90-351. These conversations however, are unrelated to this case and occurred prior to his retention as counsel by the defendant, on or about September 14, 1972.

JOHN H. DAVITT
John H. Davitt
Acting Deputy Assistant
Attorney General

Subscribed and sworn to before me
this 10th day of November, 1972.

AUDREY ANNE CRUMP
My Commission Expires August 31, 1976

(SEAL)

Certificate of Service

This is to certify that three (3) copies of the aforegoing Petitioners' Reply have been served by certified mail upon Erwin Griswold, Solicitor-General of the United States, Department of Justice, Washington, D. C. 20530, this 20th day of December, 1972.

JAMES REIF
Attorney for Petitioners